Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1764

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

GEORGE WALTON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE WALTON,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania entered in the above-entitled case on January 29, 1976.

OPINIONS BELOW

The unreported opinion of the Court of Common Pleas of Philadelphia County is set out at pages 9a-26a of petitioner's Appendix. The opinion of the Supreme Court of Pennsylvania, reported as Commonwealth ex rel. Walton v. Aytch, ___ Pa. ___, 352 A.2d 4 (1976) is set out at pages 1a-8a of petitioner's Appendix.

JURISDICTION

The order of the Supreme Court of Pennsylvania was entered on January 29, 1976. A timely petition for reargument was filed and denied on March 5, 1976. This petition for certiorari was filed within 90 days of the order denying reargument. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Where a criminal defendant, through counsel, refuses to move for a mistrial, but effectively precludes the trial judge from pursuing all available alternatives which would have allowed the trial to proceed, should the mistrial be considered to be defense-requested for double jeopardy purposes?

2. Did the Supreme Court of Pennsylvania misconstrue applicable decisions of this Court in holding that the double jeopardy clause bars retrial unless the manifest necessity for the grant of a mistrial is free from doubt?

3. Did the Supreme Court of Pennsylvania disregard applicable decisions of this Court in holding that as a matter of law the defendant's interests have not been considered where the trial judge acts before consulting counsel, and by refusing to consider the mistrial decision in the context of the totality of the surrounding circumstances?

4. Did the Supreme Court of Pennsylvania disregard applicable decisions of this Court in refusing to consider the declaration of the mistrial in relation to the ends of public justice?

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 1764

Louis Aytch, Supt.
Phila. County Prisons,
Petitioner

v.

GEORGE WALTON,
Respondent

ERRATA

At page 4, line 4 of petitioner's statement of the case should read:

$500. Three other adults present at the time were killed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On February 18, 1974, at 5180 Viola Street in West Philadelphia, four people were murdered. One death was a "contract-killing," the fee being $500. Three other adults present at the time were to insure that there would be no eyewitnesses to the execution. Respondent, George Walton, together with Leroy Brown and James Whitaker were subsequently arrested and charged as being the perpetrators of the crime. Respondent was charged with four counts of murder as of Indictments, Nos. 134-137 of April Sessions, 1974, and one count of conspiracy as of Indictment No. 138 of April

Sessions, 1974. Respondent was brought to trial on November 27, 1974 before the Honorable Stanley L. Kubacki. The first day was consumed with the selection of the jury; twelve jurors and two alternates were selected from two separate panels. In his preliminary remarks to each panel, Judge Kubacki advised the jurors that they would not be sequestered but could return home each evening except for a "remote chance" of spending one night in a hotel during their actual deliberations. The jury was excused for the Thanksgiving weekend without being sworn. (28a, 29a)[1]

The trial was scheduled to resume on December 2, 1974; however, it was continued until December 3, 1974 because of a complication in the Commonwealth's case. The Commonwealth had originally commenced the trial of respondent with the understanding that co-defendant Leroy Brown intended to enter a plea of guilty to all charges and appear as a witness against respondent. Sometime between November 27, 1974, and December 2, 1974, the Commonwealth was suddenly informed that Brown would not

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[1]Page references are to the separately bound appendix filed with the instant petition.

enter a plea of guilty and would assert his Fifth Amendment privileges if called as a witness at respondent's trial. Because of this development, the Commonwealth, on December 2, 1974, went before the Honorable David N. Savitt, sitting as homicide calendar judge,[2] and requested that respondent's trial be continued so that Brown could be tried first. The continuance was denied (30a-48a). During the hearing before Judge Savitt, the First Assistant District Attorney informed the Court that Brown's change of heart occurred because respondent had convinced him not to testify. (55a).

The trial reconvened on December 3, 1974 before Judge Kubacki. At that time, defense counsel brought to the Court's attention, an article which had appeared on December 2, 1974 in the Daily News, a newspaper of general circulation in Philadelphia. The article, which is reproduced in its entirety in petitioner's appendix at 104a,

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[2]Under the practice followed in the Common Pleas Court of Philadelphia, all murder cases are listed in a central "homicide calendar room" and are assigned to a trial judge and courtroom on the day of trial, after the calendar judge ascertains that both sides are ready to proceed. The calendar judge also hears and decides all pretrial matters (except suppression motions.)

contained a general statement concerning Brown's refusal to testify, and stated that this was the reason underlying the Commonwealth's application for a continuance. Defense counsel initially moved for the discharge of the jury, but then withdrew that motion[3] to ask instead that the trial judge give a cautionary instruction regarding the article (56a). After it was ascertained that none of the jurors had read the article, the jury was sworn and trial proceeded (59a).

Later that day, defense counsel brought to the Court's attention a second article which had appeared in the December 3 issue of the Daily News. The article read as follows:

BROWN SILENCED BY WALTON: D.A.

> First Assistant District Attorney Richard A. Sprague yesterday accused mass murder defendant George Walton, 30, of convincing a co-defendant not to testify at Walton's trial.
>
> Sprague told Judge David N. Savitt that Walton spoke to Leroy Brown, 23, of Hazel Avenue near 57th Street, 'during the past week.'

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[3]This would have been tantamount to a motion for mistrial. See Pennsylvania Rule of Criminal Procedure 1118.

Judge Savitt turned down a motion to postpone Walton's murder case to try Brown first. Brown had indicated that he would plead guilty last week but changed his mind and now has decided not to admit guilt nor to testify against Walton.

A tip furnished through the Daily News secret witness program led to Walton's arrest.

Walton and Brown are accused of fatal shootings of four persons inside the home at 4180 (sic) Viola Street March 7th.

Testimony is due to begin today at Walton's trial and Sprague says 'the Commonwealth is substantially impaired in the prosecution of the case.'

Fatally shot were Ruby Holland, 24 of the Viola Street address; Cathy Ferrara, 20, of 578 Barrett Avenue, Haverford; Ronald Hand, 20, of 2704 55th Drive, Bartram Village, and Charles Wallace, 34, of Aspen Street near 38th.[4]

After reading this article, which defense counsel described as "very prejudicial to Walton" (64a), the trial judge decided he must sequester the jury (61a). The panel was then questioned to determine whether the sequestration would

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[4] The facts in the article apparently were obtained by a reporter who was present at the hearing before Judge Savitt on December 2. There has never been any claim that the District Attorney gave the facts to the newspaper or behaved improperly in any way.

constitute a hardship. During the questioning, one juror stated that it would,[5] and she was excused and replaced by the first alternate (63a-64a). At this time the Assistant District Attorney requested that the sequestration order be lifted but the judge refused on grounds that it would be too risky and probably be contested on appeal by the defense (64a). Later in the day, another juror had to be excused and replaced by the remaining alternate (81a).[6] The Assistant

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[5] Her husband and child were sick at home.

[6] This juror was needed to cook and care for aged parents who were ill. When court officers notified them that their son was sequestered and could not return home at night, the mother became "almost hysterical." The juror, of course, was "very, very concerned." (69a). The Assistant District Attorney objected to the dismissal of the last alternate and asked instead that the sequestration order be lifted with cautionary instructions. Alternatively, he requested that this juror be sent home with a court officer to maintain the sequestration. The court refused, ruling:

> THE COURT: I have made my decision. I am going to excuse him because I want him to concentrate on this case. I do not want to separate the jury. The risks are too great in a situation like that.

(79a). The Assistant District Attorney then asked that defense counsel state whether respondent would agree to proceed with eleven jurors if another emergency befell one of the remaining twelve. Counsel refused to state his position at that time.

District Attorney then requested that instead of excusing him, the juror be permitted to return home accompanied by a court officer or other official. (78a). The judge refused this on grounds that under the circumstances the jury should not be separated, and also that he wanted jurors who could concentrate on the case (79a). Thus, at the adjournment of trial on December 3, 1974, the jury consisted of twelve jurors and no alternates.

At 11 p.m. on December 3, 1974, the trial judge received a phone call from a court officer. The court officer informed the judge that one of the remaining jurors had been unsuccessful in acquiring a baby sitter for her children, aged ten and six, who were then alone in their home. (85a-86a). After speaking with the juror, the judge determined that she was "very very distressed" and allowed her to attempt to reach certain neighbors to watch the children. After approximately forty-five minutes of unsuccessful efforts, Judge Kubacki permitted the juror to go home to her children. (87a).

On December 4, 1974, when the trial was to reconvene, the judge related the previous nights events to counsel and informed them that there

were now only eleven jurors remaining. Counsel for the Commonwealth then suggested that defense counsel consent to proceed with eleven jurors pursuant to Pennsylvania Rule of Criminal Procedure 1103; or that the juror who had been allowed to go home the night before be brought in and an extensive colloquy conducted to determine whether she had been exposed to some prejudicial matter which would prevent her being returned to the jury. Judge Kubacki noted that the juror had not been "specifically discharged" (93a). He then inquired whether the juror had returned to court from her home and learned that she had not (95a).

Judge Kubacki listened carefully to the positions of both counsel.[7] The Assistant District Attorney urged that the trial continued by one of the methods outlined above, but defense counsel vehemently opposed both alternatives. He flatly refused to proceed with eleven jurors,[8] and Rule

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[7]The tripartite discussion of alternatives consumed fifteen pages of notes of testimony. (85a-100a).

[8]When questioned by Judge Kubacki, the defendant initially stated that he wanted counsel to speak for him. After consultation with counsel, he was again asked if he chose to proceed with eleven jurors. He answered, "No, sir." (96a-97a).

1103 permits juries of fewer than twelve only if the defendant consents. The court then stated:

> I have no doubt that there was a crisis last night and it was faced. There were extensive and repeated telephone calls made. The Court did speak to [the juror] herself and he was aware of her distress when he spoke to her last night. I think there is no question that the circumstances were extreme last night when the Court made that decision and excused [the juror].
>
> The entire jury panel now knows that an article did appear in the Philadelphia Daily News and if we broke sequestration, I am wondering whether or not their curiosity would be so overwhelming that they might seek out that article. (98a-99a).

Upon being asked to respond, defense counsel stated that he objected to the juror being returned for colloquy as he felt that she was "tainted"; he also feared that she would become angry with him after the extensive questioning he contemplated conducting and would be unable to impartially consider the case. (99a-100a) The trial court then declared a mistrial.

Respondent's counsel subsequently filed a petition for writ of habeas corpus with the Common Pleas Court of Philadelphia County claiming that the retrial of respondent on the instant charges was prohibited by the double jeopardy clause of the Fifth Amendment to the United States Constitution

Hearings on the petition were held before the Honorable David N. Savitt,[9] on January 23 and February 27, 1975. On April 25, 1975, Judge Savitt issued an opinion and an order granting the writ. On April 24, Judge Savitt granted respondent's oral motion for dismissal of all charges. On that same date, Judge Savitt granted a supersedeas so that the Commonwealth could appeal.

The Commonwealth duly appealed to the Supreme Court of Pennsylvania, which on January 29, 1976, issued an opinion and order affirming the grant of the writ. Commonwealth ex rel. Walton v. Aytch, ___ Pa. ___, 352 A.2d 4 (1976).[10] The Commonwealth's petition for reargument was denied by that court on March 5, 1976.

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[9] It should be noted that the homicide calendar judge, rather than the trial judge decided the double jeopardy issue in the Court of Common Pleas. The trial judge had no opportunity to issue an opinion or make factual findings. Moreover, Judge Savitt based his decision on the record before Judge Kubacki without taking any additional evidence. Thus, this Court may freely review the facts found by the lower courts, as well as their conclusions of law.

[10] One Justice concurred in the result and two Justices filed a dissenting opinion.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In holding that the double jeopardy clause bars reprosecution in this case[11], the Supreme Court of Pennsylvania has misconstrued, misapplied, or disregarded numerous guidelines set forth in decisions of this Court. This Court has consistently "abjure[d] the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." Illinois v. Somerville, 410 U.S. 458, 462 (1973). Nonetheless, in the years between United States v. Perez, 9 Wheat. 579 (1824), and United States v. Dinitz, ___U.S.___, 96 S.Ct. 1075 (1976), several clear principles have emerged.

11/ In ruling on the case, the Supreme Court of Pennsylvania has based its decision squarely on the double jeopardy clause of the United States Constitution, as applied to the States through the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784 (1969), and the decisions of this Court and other federal courts. In Pennsylvania, there is no state basis for respondent's jeopardy claim. The double jeopardy clause of the Pennsylvania Constitution (Art. 1 Sec. 10) has been interpreted to apply to capital cases only. Commonwealth v. Baker, 413 Pa. 105, 196 A.2d 382 (1964); Commonwealth v. Richbourg, 442 Pa. 147, 275 A.2d 345 (1971). Although respondent was charged with first degree murder, when the instant indictments were brought this was not a capital case under Pennsylvania law because the death penalty could not be imposed. Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829 (1972); Commonwealth v. Segers, 460 Pa. 149, 331 A.2d 462 (1975).

First, where the mistrial is declared at the defendant's request, the manifest necessity standard is inapplicable, for in that situation[12/] there can be no double jeopardy. United States v. Dinitz, supra. Second, where the manifest necessity standard is applicable, "[t]he broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court." Illinois v. Somerville, supra at 462. In considering the exercise of this discretion, the reviewing court must take "all circumstances into account" and not focus on one event or the wisdom of one act out of context. Wade v. Hunter, 336 U.S. 684, 691 (1949). Finally, the ultimate question in determining the existence of manifest necessity is whether the declaration of the mistrial was dictated by "the ends of public justice . . ." United States v. Perez, supra at 580, "or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' Wade v. Hunter, supra at 689 . . ." Illinois v. Somerville, supra at 463. In reviewing the instant case, the Supreme Court of Pennsylvania ignored the above-cited principles, and held that the state is barred from trying a man charged with the execution murder of four persons. Because of that court's disregard of decisions

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12/ absent prosecutorial or judicial overreaching designed to prompt a motion for a mistrial.

of this Court, the sensitivity of the Constitutional provision involved[13/], and the importance to the Commonwealth of the prosecution of a crime of this seriousness, a writ of certiorari is sough

I. IN CONSTRUING THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT, THE SUPREME COURT OF PENNSYLVANIA ERRONEOUSLY APPLIED THE MANIFEST NECESSITY TEST TO A MISTRIAL DECLARED BECAUSE OF THE DEFENDANT'S VEHEMENT REJECTION OF ALTERNATIVES WHICH WOULD HAVE ALLOWED THE TRIAL TO PROCEED.

This Court held in United States v. Dinitz, supra, that the manifest necessity standard is inapplicable where the defendant has moved for a mistrial, for in that situation there can be no double jeopardy. It matters not whether he faced a "Hobson's choice", because, "The important consideration,for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed . . ." Id. at ____, 96 S.Ct. at 1081. While the respondent, through his counsel, refused to move for a mistrial, a reading of the trial record leads to the inescapable conclusion that he, in fact, retained "primary control over the course to be followed." After the sequestration

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13/ Because the double jeopardy bar provides such an extreme sanction, justice requires that the doctrine be carefully defined and consistently and circumspectly applied. Otherwise, trial courts might well become "unduly hesitant conscientiously to exercise their most sensitive judgment . . ." Gori v. United States, 367 U.S. 364, 369-370 (1961).

order was imposed, and the number of jurors began to diminish, the court and counsel had several conferences during which they discussed alternatives should the jury be reduced below twelve. Defense counsel repeatedly refused to state what course he would follow in that event.

On the morning of December 4, the trial judge told counsel that he had allowed the twelfth juror to return home, but had not discharged her. He listened receptively to the suggestions of both counsel. When the Assistant District Attorney requested that the juror might be returned to service, defense counsel vehemently objected, insisting that her partiality would be seriously impaired. He also refused to proceed with eleven jurors, a procedure only available if he approved. While asserting that he would not move for a mistrial, he urged the court to declare that a mistrial had already occurred. He was unquestionably, at that point, in full control of the proceedings.

In these circumstances the law can give no talismanic effect to counsel's refusal to make the formal motion. By closing off all means by which the trial could proceed, defense counsel moved the mistrial as surely as if he had uttered the ritual phrase.

To state that his refusal to proceed with eleven jurors is irrelevant because he had no obligation to do

so, as did the Pennsylvania Supreme Court[14/], begs the question. The proper inquiry is not whether he had a duty to proceed, but whether he retained the choice. That court apparently confused the instant argument with the doctrine of waiver, wherein by a breach of his duty to timely preserve an issue a party loses his right to appellate review. Dinitz made clear that waiver concepts have nothing to do with the choice-of-mistrial issue, which goes instead to the heart and purpose of the double jeopardy clause.

Since respondent was in control of the mistrial decision, double jeopardy should not bar retrial.

II. THE SUPREME COURT OF PENNSYLVANIA MISCONSTRUED OR ENTIRELY DISREGARDED APPLICABLE DECISIONS OF THIS COURT IN ITS INTERPRETATION OF THE MANIFEST NECESSITY STANDARD, UNDER THE DOUBLE JEOPARDY CLAUSE.

In the instant case, the Pennsylvania court held:

> . . . [W]e do not think the necessity for the trial judge's action is clearly manifest such that the propriety of the declaration of the mistrial is free from doubt.
> (5a)

There is absolutely no support in the law for the conclusion by the lower court that in the hindsight

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14/ It is noteworthy that the Common Pleas Court rejected this argument on the basis of the Fifth Circuit's erroneous holding in the Dinitz case. (20a)

of appellate wisdom, "manifest necessity" must be established beyond all doubt. On the contrary, this Court has held that:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be obtained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.ed. 968; Logan v. United States, 144 U.S. 263, 12 S.Ct. 28, 32-33 47 L.ed. 79. It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be served. . .," Brock v. United States, 344 U.S. 424, 427 73 S.Ct. 349, 350 97 L.ed. 456, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. See Lovato v. State of New Mexico, 242 U.S. 199, 37 S.Ct. 107, 61 L.ed. 244; Wade v. Hunter, [336 U.S. 684, 69 S.Ct. 834]. (Emphasis supplied) (footnotes omitted)

Gori v. United States, supra, 367 U.S. at 368.

It is submitted that in adopting the "free from doubt" standard, the Pennsylvania court has thoroughly emasculated the notion of "broad discretion reserved to the trial judge". Illinois v. Somerville, supra at 462.

Moreover, the Pennsylvania court held that:

> The trial court could have at least tried to contact both attorneys involved in the case to ascertain if they had any suggestions . . . . Even though the same

> decision may have resulted and even though the same decision may have been upheld as manifestly necessary had the attempt bee made, the failure to make any attempt to contact counsel creates a doubt as to the propriety of the exercise of discretion because it does not indicate a consideration of Walton's interest was made. (5a-6a) (footnotes omitted) (emphasis supplied)

The court thus created a rule that failure to consult with counsel indicates as a matter of law that the defendant's interests were not considered by the trial court and thus the double jeopardy clause bars retrial. Such a rule is flatly inconsistent with Gori v. United States, supra, wherein this Court found, "[W]hat is unquestionable is that the order [directing a mistrial] was the product of the trial judge's extreme solicitude -- an overeager solicitude it may be -- in favor of the accused." Id. at 367. In Gori the trial judge declared the mistrial without forewarning or consulting either counsel. (Moreover, in Gori, both counsel and the defendant were present in the courtroom and could easily have been consulted. Here, the trial court was forced to make a decision in the face of a late-night emergency. Even had he been able to reach defense counsel, there was insufficient time for the attorney to consult respondent in jail.

Moreover, in applying this rule, the Pennsylvania court erroneously ignored the totality of the circumstances. Instead of considering the implications of the

entire chain of events leading to the declaration of a mistrial and the resultant legal difficulties, it viewed the discharge of the third juror as though it had occurred in a vacuum.15/

As pointed out by the dissenting Justices, certain facts surrounding the discharge of the first and second jurors to be excused are pertinent. (7a). The third juror was discharged because of an urgent situation regarding the care of her two young children. The second juror to be excused was discharged because of an urgent situation which concerned the care of his aged parents.

15/ The court cavalierly disposed of the chain of events leading up to the mistrial as follows:

> The Commonwealth argues that the newspaper articles caused the mistrial and that, viewed as a whole, the series of determinations by the trial judge were designed to avoid a mistrial and that he declared a mistrial because his other attempts to avoid it failed and therefore, viewed in this light, the mistrial had become absolutely necessary since all other reasonable alternatives to avoid a mistrial had been pursued. We fail to see how the previous determinations made by the trial judge can remove the taint of an improper exercise of discretion at the time the juror was dismissed under the instant facts.

(6a, n.4). One is compelled to the conclusion that in reviewing the case of a sunken ship, that court would hold that the damage was not the fault of the torpedo which struck the hull, but of the Captain who didn't bail fast enough.

(68a-82a). At that time, the Assistant District Attorney suggested that the juror be sent home with a court officer or sheriff to accompany him. (78a). The court replied, "I have made my decision. I am going to excuse him because I want him to concentrate on this case. I do not want to separate the jury. The risks are too great in a situation like that." (79a).

These portions of the record establish that: (1) the judge had decided that the risk that the jurors might see the Daily News article if they were not sequestered was too great; (2) it was the judge's opinion that a juror who was having urgent problems at home such as children (or aged parents) who needed care would not be able to concentrate properly on the events occurring in the courtroom and should be excused; and, (3) the judge had concluded that having a juror accompanied to his or her home with a court officer or other official was not an acceptable solution to the problem. Thus, it is fair to assume from the record, (as did the dissenting Justices), that when faced with the problem posed by the need of the third juror to return home at midnight to care for her children, the judge was well aware that counsel for the parties would suggest alternatives already rejected by him: that sequestration be lifted or that the juror be accompanied home with a court officer.[16/]

16/ The record also establishes that neither attorney had anything further to suggest on the following morning.

In making these decisions, the judge was primarily motivated by the interest of the defendant in being tried by a fair and impartial jury, one that had not been exposed to prejudicial newspaper articles and was not anxious about personal problems outside the courtroom which would interfere with their concentration. It has long been settled that the manifest necessity standard is satisfied where jurors are excused because the trial court determines that they could not fairly consider the case. Simmons v. United States, 142 U.S. 148 (1891).

It may also be argued that reprosecution is permissible under the doctrine of Gori v. United States, supra, that the Court will not look behind a mistrial granted in the sole interest of the defendant. It is suggested that in discharging the jurors the trial judge was motivated solely by the defendant's interests in a fair jury as outlined above. While Judge Kubacki appropriately responded to the personal difficulties faced by the individual jurors, these problems could have been resolved by lifting the sequestration order. This Judge Kubacki refused to do because of his concern that the jury remain impartial and undistracted.17/

17/ Not only do the facts of the instant case show that the trial judge was motivated by the interest of the defendant, but the record clearly establishes that the District Attorney was free from fault and, in fact, consistently opposed the declaration of a mistrial and made every effort to suggest ways in which the trial could continue.

Finally, the court below refused to consider whether the mistrial declaration was appropriate in light of, "the public's interest in fair trial designed to end in just judgments", Illinois v. Somerville, supra at 463, quoting from Wade v. Hunter, supra. The Pennsylvania court summarily rejected this standard as follows:

> We need not examine the events and circumstances surrounding the declaration of the mistrial in relation to the "ends of justice." United States v. Perez, supra 22 U.S. at 580. "The ends of public justice" or, more precisely, "'the public's interest in fair trials designed to end in just judgments'", Illinois v. Somerville, supra 410 U.S. at 463, 93 S.Ct. at 1070, quoting from Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974, is a consideration which is made wherein a prejudicial element is injected or discovered at trial, such that, a mistrial serves to eliminate the prejudicial element and foster a just judgment. See generally, Commonwealth v. Robson, ___Pa.___, 337 A.2d 573 (1975); Commonwealth v. Stewart, supra; Commonwealth v. Shaffer, supra. This case does not involve the injection or discovery of a prejudicial element.

(6a at n.5). The error in the Pennsylvania court's analysis becomes at once apparent when one considers that none of the federal cases cited (Perez, Somerville and Hunter) involved injection of any "prejudicial elements." Moreover, the Pennsylvania court's finding that no such element existed in this case was clearly erroneous. Certainly the appearance of the Daily News Article on December 3, 1974, constituted just such a "prejudicial element". It was in fact this article which was the pivotal event which eventually caused the declaration of

the mistrial in the instant case. Had three of the jurors seen this article there is no doubt that a mistrial would have been required and reprosecution of respondent would not be barred.[18/] Illinois v. Somerville, supra; Simmons v. United States, supra; Commonwealth v. Pierce, 451 Pa. 190, 303 A.2d 209 (1973); Commonwealth v. Stewart, 456 Pa. 447, 317 A.2d 616 (1974). It was in attempting to avoid the necessity for a mistrial based on that ground that the court ran into the problem of the diminishing number of jurors who could remain in service. The trial judge determined that sequestration was necessary to prevent the jury's exposure to highly prejudicial publicity. Three of the jurors asked to be excused because compelling personal obligations made their sequestration burdensome (if not hazardous) to their families. The judge further determined that to force these jurors to remain isolated from their families who needed them would prevent their giving their full attention to the case. It is certainly not unreasonable for a judge to require that, in a case involving the execution of four persons, the jury be comprised of persons able to pay attention to the evidence undistracted by serious personal concerns. Since the "interests of public justice" would require a jury that was impartial and able to concentrate on the case, the

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18/ Indeed, when the first article appeared, defense counsel moved for a mistrial, then withdrew the motion.

trial court committed no abuse of discretion in determining that the inability of the twelfth juror to remain sequestered necessitated a mistrial. Moreover, having reached this conclusion after listening to the suggestions of both counsel and weighing all the relevant circumstances, the trial court committed no abuse of discretion. United States v. Jorn, 400 U.S. 470 (1971).

In summary, the Pennsylvania court misconstrued virtually all of the applicable guidelines handed down by this Court in barring retrial in the instant case. In so doing, it has placed a more restrictive interpretation on the double jeopardy clause of the Fifth Amendment of the United States Constitution than has this Court. This it has no power to do. Oregon v. Haas, 420 U.S. 714 (1975).

CONCLUSION

It is therefore respectfully submitted that a Writ of Certiorari should issue to review the decision of the Supreme Court of Pennsylvania.

Respectfully submitted,

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BONNIE BRIGANCE LEADBETTER
Assistant District Attorney
STEVEN H. GOLDBLATT
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F. EMMETT FITZPATRICK
District Attorney

Supreme Court, U. S.
FILED
JUN 3 1976
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1764

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

GEORGE WALTON,
Respondent

APPENDIX

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COMMONWEALTH of Pennsylvania ex rel. George WALTON, Appellee,

v.

Louis AYTCH, Superintendent, Philadelphia County Prisons, Appellant (two cases).

Supreme Court of Pennsylvania.

Argued Oct. 21, 1975.

Decided Jan. 29, 1976.

Rehearing Denied March 5, 1976.

Defendant filed petition for habeas corpus following sua sponte declaration of mistrial by trial judge. The Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, Nos. 134–138, April Term 1974, David N. Savitt, J., granted writ, and Commonwealth appealed. The Supreme Court, at Nos. 425, 459, January Term 1975, Eagan, J., held that where sua sponte mistrial of defendant, due to trial judge's dismissal of one juror from sequestration, was not manifestly necessary, retrial was prohibited by Fifth Amendment.

Affirmed.

Pomeroy, J., dissented and filed opinion in which Nix, J., joined.

1. Criminal Law ⇐184

Another trial is allowable where court sua sponte declares mistrial without defendant's consent and over his objection where "manifest necessity" justifies declaration of mistrial. U.S.C.A.Const. Amends. 5, 14.

2. Criminal Law ⇐184

In determining whether defendant may be retried after mistrial, pivotal question is whether trial court properly exercised its discretion in finding that either manifest necessity or ends of public justice required declaration of mistrial. U.S.C.A.Const. Amends. 5, 14.

3. Criminal Law ⇐184

Where sua sponte mistrial of defendant, due to trial judge's dismissal of one juror from sequestration, was not manifestly necessary, retrial was prohibited by Fifth Amendment. U.S.C.A.Const. Amends. 5, 14; Pa.R.Crim.P. Rules 1103, 1111(c).

F. Emmett Fitzpatrick, Dist. Atty., Steven H. Goldblatt, Asst. Dist. Atty., Chief, Appeals Div., Carolyn E. Temin, Philadelphia, for appellant.

Bashman, Deutsch & Bernstein, Stanley Bashman, Philadelphia, for appellee.

Before JONES, C. J., and EAGEN, O'BRIEN, ROBERTS, POMEROY, NIX and MANDERINO, JJ.

OPINION OF THE COURT

EAGEN, Justice.

This is an appeal by the Commonwealth from an order of the Court of Common Pleas of Philadelphia granting a petition for a writ of habeas corpus.[1] The petition was filed following the *sua sponte* declaration of a mistrial by the trial judge in *Commonwealth v. Walton*. The court granted the petition because it determined that any attempted retrial of George Walton, relator, would constitute a violation of his Fifth Amendment right against being put twice in jeopardy since the *sua sponte* declaration of a mistrial was not justified by the circumstances and events surrounding it. We agree and therefore affirm. The pertinent facts are as follows:

Walton was brought to trial on November 27, 1974, on four counts of murder and one count of conspiracy. A jury panel of twelve jurors and two alternates was chosen on this day. The panel was then excused for Thanksgiving weekend without being sworn. Although trial was scheduled

1. The jurisdiction of this Court is based on the Appellate Court Jurisdiction Act of 1970, P.L. 673, No. 223, art. II, § 202(1), 17 P.S. § 211.202(1) and art. V, § 503(c), 17 P.S. § 211.503(c).

to continue on December 2, 1974, because of a motion for a continuance by the Commonwealth resulting from a last minute refusal of a witness, Leroy Brown, to testify, trial did not resume until December 3, 1974.

On December 3, 1974, defense counsel brought to the court's attention an article which had appeared in a newspaper in Philadelphia on December 2, 1974. The article stated that Brown had refused to testify and that the refusal was the reason the Commonwealth had sought a continuance. Defense counsel moved to discharge the jury but withdrew his motion and sought a precautionary instruction regarding the article. The trial judge gave the requested instruction and ascertained that no members of the panel had read the article. The jury was then sworn.

Later on the same day, the trial judge discovered another newspaper article which had been published on December 3, 1974. This article reported that the First Assistant District Attorney had accused Walton of convincing Brown not to testify. The trial court then decided to sequester the jury. The panel was questioned as to whether sequestration would constitute a hardship since the members of the panel, when originally selected, had been informed they would not be sequestered except during deliberations.

During the questioning, one juror indicated that the sequestration would be a hardship. That juror was excused and replaced by an alternate. Later in the day, another juror had to be excused and replaced by the other alternate due to hardship. Thus, at the adjournment of trial on December 3, 1974, the jury consisted of twelve jurors and no alternates.

At 11:00 p. m. on December 3, 1974, the trial judge received a phone call from a court officer. The court officer informed the judge that one of the jurors had been unsuccessful in acquiring a baby sitter for her children. After speaking with the juror, the judge determined that she was "very, very distressed" and allowed her to attempt to reach certain neighbors to watch the children. The attempt was unsuccessful. After being informed of this, the judge allowed the juror to go home apparently without directing her to return on December 4, 1974. He did so without consulting either counsel involved.

On December 4, 1974, when the trial was to reconvene, the judge related the previous night's events and informed the parties that: "We now have eleven jurors." Defense counsel then informed the court that his client would not proceed with eleven jurors, that he was not motioning for a mistrial, and that the trial judge's actions had caused a mistrial.

Counsel for the Commonwealth then stated: (1) that defense counsel could consent to proceed with eleven jurors under Rule 1103 of the Pennsylvania Rules of Criminal Procedure; and, (2) that the juror allowed to go home the night before could be returned and an extensive colloquy could then be conducted. Defense counsel stated the juror was no longer part of the jury. The trial judge then stated that the juror had not been "specifically discharged." Counsel for the Commonwealth then expressed the opinion that sequestration was in the discretion of the trial judge and it would be up to the trial judge to determine if the juror could be returned. The judge then inquired whether the juror had returned from home and learned she had not. He then conducted a colloquy with Walton, who was allowed to consult counsel, as to whether he would proceed with eleven jurors. Walton refused to do so.

Counsel for the Commonwealth then requested the return of the juror to determine: (1) the precise nature of the previous night's crisis; and (2) the state of mind of the juror and whether she discussed the case with anyone. He then requested that following such an inquiry the court rule whether the juror could be returned to the jury and whether the sequestration should continue.

The trial judge then stated that he had no doubt a crisis had existed the previous night and that he had reservations about lifting the sequestration. Defense counsel then stated he objected to the return of the juror because she might become angry with him after the extensive questioning he would like to conduct if an attempt were made to return her to the jury panel. Further, defense counsel stated the juror was tainted. The trial judge thereupon declared a mistrial formally.

The Commonwealth sought to retry Walton and he petitioned for a writ of habeas corpus. The Court of Common Pleas granted the petition.

[1] The double jeopardy clause of the Fifth Amendment of the United States Constitution was made applicable to the states through the Fourteenth Amendment in *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). There is no question that under the instant facts jeopardy had attached in the first trial, but the mere fact that jeopardy had previously attached and then terminated does not prohibit another prosecution following a *sua sponte* declaration of a mistrial. Another trial is allowable where a court *sua sponte* declares a mistrial without the defendant's consent and over his objection where "manifest necessity" justifies the declaration of the mistrial. As stated by Mr. Justice Story in *United States v. Perez*, 22 U. S. (9 Wheat.) 579, 6 L.Ed. 165 (1824);

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office."

United States v. Perez, supra at 580.

The United States Supreme Court and this Court have consistently adhered to this formulation. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *Commonwealth v. Stewart*, 456 Pa. 447, 317 A.2d 616 (1974). But before determining whether the circumstances and events presented a situation of manifest necessity, it is necessary to determine when the mistrial occurred.

The Court of Common Pleas determined that, although the trial judge formally declared a mistrial on the morning of December 4, 1974, the mistrial actually occurred the night before when the juror was discharged. It thus examined the circumstances and events surrounding the decision to allow the juror to return home to determine if "manifest necessity" existed. The Commonwealth argues that this was incorrect because the mistrial did not occur until the trial judge formally declared it on the morning of December 4, 1974. The Commonwealth reasons that this is so because: (1) the trial could have continued if defense counsel and the defendant had agreed to return the juror who had been allowed to return home; and, (2) the trial could have continued if defense counsel and the defendant had agreed to proceed with eleven jurors as allowed by Pa.R.

Crim.P. 1103. Moreover, reasons the Commonwealth, the refusal to proceed with less than twelve jurors and the objection to the return of the juror, who had returned home, was tantamount to a request for a mistrial.

First, the trial judge must have viewed his action of allowing the juror to return home as a discharge of the juror [2] because had he viewed his action as merely excusing the one juror from sequestration, he could have returned the juror over the objection of defense counsel. Thus, since the juror was discharged when she was allowed to return home, the possibility of returning her did not exist.

Second, the Commonwealth misconceives the nature of Rule 1103.[3] The rule states that the defendant *may* agree to proceed with less than twelve jurors. The Commonwealth's position would require a ruling that the defendant *must* proceed with less than twelve jurors or waive any claim that the discharge was not manifestly necessary and thus give up his interest in having the jury as originally empaneled determine his guilt or innocence. See *United States v. Jorn*, supra. Such a ruling is unacceptable for two reasons: (1) it is contrary to the clear and unambiguous language of Rule 1103, see Pa.R.Crim.P. 2, 1 C.P.S.A. § 1921(b); and (2) it would require a defendant to give up his interest in having the jury as originally empaneled determine his guilt or innocence and thus improperly abridge a substantive right of a defendant, see Pa.Const. art. 5, § 10(c).

The clear language of Rule 1103 grants a defendant, subject to the supervision of the court, an option of proceeding with less than twelve jurors. Thus, after the dismissal of a juror over objection, if the defendant and his counsel still believe the juror was improperly discharged, the defendant may refuse to proceed with less than twelve and thereby require the court to formally declare the mistrial. The attempt to retry would then ripen the issue of whether the discharge was manifestly necessary and thus the double jeopardy issue would be properly raised. If the defendant and his counsel believe circumstances of manifest necessity existed despite his objection, the defendant may agree to proceed with less than twelve or consent to the formal declaration of a mistrial, thus waiving the double jeopardy claim because he does not think his interest in the jury as originally empaneled has been improperly denied.

Under the Commonwealth's asserted analysis of the Rule, double jeopardy could never be raised after the improper dismissal of a juror and subsequent attempt to retry because the failure to proceed with less than twelve jurors would be viewed as a waiver of the double jeopardy claim. As noted, this analysis is contrary to the express language of Rule 1103 and would abridge a defendant's substantive right.

Since Walton did not have to proceed with eleven jurors and since the other juror could not be returned as of the time of her discharge, that is, when she was sent home, the trial was aborted when the juror was sent home. Thus, since the discharge terminated the trial, the circumstances and events surrounding the juror's discharge are those which must be examined to determine if the termination or mistrial was manifestly necessary.

2. This Court need not now determine whether a juror could be excused from sequestration for a night and then returned to duty since, as the textual discussion indicates, the trial judge must have viewed the juror as discharged.

3. Pa.R.Crim.P. 1103 provides:
"In all cases, except those in which a capital crime is charged, the defendant at any time before verdict may agree, with the consent of his attorney, and approval by a judge of the court in which the case is pending, to be tried by a jury of less than twelve but not less than six."
The textual analysis eliminates any need to discuss the exception in the Rule for capital offenses because even assuming the Rule is applicable, it does not support the Commonwealth's position.

[2] In applying the *Perez* doctrine of manifest necessity, this Court has previously stated that:

". . . the pivotal question . . . [is] whether the trial court properly exercised its discretion in finding that either manifest necessity *or* the ends of public justice required the declaration of a mistrial.

"In accordance with the scope of our review, we must take into consideration *all* the circumstances when passing upon the propriety of a declaration of mistrial by the trial court. The determination by a trial court to declare a mistrial after jeopardy has attached is not one to be lightly undertaken, since the defendant has substantial interest in having his fate determined by the jury first impaneled. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)." [Emphasis in original.]

Commonwealth v. Stewart, supra at 451–52, 317 A.2d at 618. Moreover,

"In determining whether a trial judge abused his discretion in granting a mistrial, the Supreme Court . . . rather than establishing any clear-cut rules for when a mistrial should be granted, simply reiterated the standard of 'manifest necessity' . . . and offered the following caveat: "'. . . in the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'"

Commonwealth v. Ferguson, 446 Pa. 24, 29, 285 A.2d 189, 191 (1971).

Furthermore,

"'We resolve any doubt "in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion."'"

Commonwealth v. Shaffer, 447 Pa. 91, 98, 288 A.2d 727, 732 (1972), quoting from *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033, 1034, 10 L.Ed.2d 100 (1963).

[3] In examining the circumstances and events surrounding the discharge of the juror, we do not think the necessity for the trial judge's action is clearly manifest such that the propriety of the declaration of the mistrial is free from doubt.

The trial court could have at least attempted to contact both attorneys involved in the case to ascertain if they had any suggestions. In order to properly exercise his discretion, the trial judge should have sought out such suggestions, particularly those of defense counsel, in order to indicate that the determination was tempered by a consideration of Walton's interest.

The court in its opinion granting the petition for the writ of habeas corpus listed various suggestions which might have been brought to the attention of the trial judge by either attorney to avoid the mistrial. Among the court's suggestions were: (1) sending a court officer with the juror to maintain the sequestration, or (2) lifting the sequestration, in accord with the trial judge's power pursuant to Pa.R.Crim.P. 1111(c). While these suggestions may not have been acceptable to the trial judge, and while both attorneys involved may not have had any suggestions, and while neither attorney may have been available, the exercise of discretion is tainted by the trial judge's failure to attempt to contact them before discharging the juror. Even though the same decision may have resulted and even though the same decision might have here been upheld as manifestly necessary had the attempt been made, the failure to make any attempt to contact counsel creates a doubt as to the propriety of the ex-

ercise of discretion because it does not indicate a consideration of Walton's interest was made.[4]

Thus, because of the failure to attempt to contact either attorney, that is, a failure to indicate a consideration of Walton's interest, whether the mistrial was manifestly necessary is subject to doubt. It follows that a retrial is prohibited by the Fifth Amendment because the necessity of the mistrial is not clearly manifested under all the circumstances. *Commonwealth v. Shaffer*, supra.[5]

The order of the Court of Common Pleas granting the petition for a writ of habeas corpus is therefore affirmed.

ROBERTS, J., concurs in the result.

POMEROY, J., filed a dissenting opinion in which NIX, J., joins.

POMEROY, Justice (dissenting).

I am unable to agree with the majority that the trial judge abused his discretion in discharging the twelfth juror.*

In its consideration of whether "manifest necessity" existed for her discharge, the Court properly uses the test expounded long ago by the Supreme Court of the United States in *U. S. v. Perez*, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824), and followed by this Court, see *e.g. Com. v. Stewart*, 456 Pa. 447, 317 A.2d 616 (1974) and Pa.R.Cr.P. 1118, 19 P.S. (Special Pamphlet), for determining whether a mistrial was properly declared *sua sponte*. I, of course, have no quarrel with the standard employed by the Court. My difference with the majority is in the interpretation and application of that standard to the facts of this case.

I

The Court affirms the order of the court of common pleas because in its view, "[i]n examining the circumstances and events surrounding the discharge of the juror, we do not think the necessity for the trial judge's action is clearly manifest such that the propriety of the declaration of the mistrial is *free from doubt*." Opinion, *ante* at 8 (emphases added). If the Court intends to say that the trial judge's action, in order to come within the *Perez* rubric, must be free of *all* doubt, I believe that the Court is interpreting that standard much too narrowly.

In determining guilt, we require only that the fact-finder be convinced "beyond a

4. The Commonwealth argues that the newspaper articles caused the mistrial and that, viewed as a whole, the series of determinations by the trial judge were designed to avoid a mistrial and that he declared a mistrial because his other attempts to avoid it failed and therefore, viewed in this light, the mistrial had become absolutely necessary since all the other reasonable alternatives to avoid a mistrial had been pursued. We fail to see how the previous determinations made by the trial judge can remove the taint of an improper exercise of discretion at the time the juror was dismissed under the instant facts.

5. We need not examine the events and circumstances surrounding the declaration of the mistrial in relation to "the ends of justice." *United States v. Perez*, supra 22 U.S. at 580. "The ends of public justice" or, more precisely, "'the public's interest in fair trials designed to end in just judgments.'" *Illinois v. Somerville*, supra 410 U.S. at 463, 93 S.Ct. at 1070, quoting from *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974, is a consideration which is made wherein a prejudicial element is injected or discovered at trial, such that, a mistrial serves to eliminate the prejudicial element and foster a just judgment. See generally, *Commonwealth v. Robson*, — Pa. —, 337 A.2d 573 (1975); *Commonwealth v. Stewart*, supra; *Commonwealth v. Shaffer*, supra. This case does not involve the injection or discovery of a prejudicial element.

* The court below concluded that the mistrial was declared when that juror was discharged, and allowed to go home, and not on the following morning. This conclusion, which the majority now accepts, is at least subject to some doubt in light of the simple fact that the judge upon ordering the discharge of this one juror did not release all of the others from sequestration at the same time.

reasonable doubt" before it may return a verdict of conviction. We do not require certitude beyond all doubt even for that most grave decision. Surely in determining whether a judge abused his discretion in declaring a mistrial we are not to employ a standard higher than that required for ascertaining guilt.

The Supreme Court of the United States in *Gori v. U. S.*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961), stressed the great breadth of the trial judge's discretion in situations of this sort:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment." *Id.* at 368, 81 S.Ct. at 1526, 6 L.Ed.2d at 901.

See also *Illinois v. Somerville*, 410 U.S. 458, 462, 93 S.Ct. 1066, 35 L.Ed.2d 425, 430 (1973). Clearly with such discretion reposing in the trial judge, it was not intended that he be so circumscribed as to be able to act only when free of all doubt. The cases are plain that a court may declare a mistrial if "manifest" necessity exists. The majority today, in my view, would read "manifest" to mean "absolute." The trial courts' discretion is thus reduced to virtual nothingness.

II

The Court does not, nor could it, question the trial court's finding that the twelfth juror was "very, very distressed" at the time she was excused from the jury panel. The principal vice, in the Court's view, in the trial court's decision to discharge her was the failure "to contact both attorneys involved in the case to ascertain if they had any suggestions." *Id.* This fact, to the Court, indicates the absence of any showing that the exercise of the trial judge's was "tempered by a consideration of Walton's interest." *Id.* While I agree that it would have been preferable for the judge to consult with counsel for the parties at the time the crisis arose, I do not agree that failure to do so justifies the conclusion that the defendant's interest was lost sight of.

The Court's reason for requiring consultation with counsel is the belief that counsel would have provided the trial judge with possible alternatives to discharge, such as sending a court officer with the juror or lifting the sequestration order. The Court does not hold that the trial court was bound to follow one of these possible alternatives. What apparently is important to the Court is not that one of these alternatives must be followed, but that there be some evidence that they were considered. Indeed, the Court's opinion concedes that "the same decision might have here been upheld as manifestly necessary had the attempt [to contact counsel and solicit alternatives] been made." Opinion, *ante* at 8–9. The Court is thus finding fault not with the trial court's decision, but his manner of deciding. I question whether this is our proper role, but even if it were, I believe the Court has overlooked a vital part of the record which does provide some evidence that the court considered and rejected possible alternatives.

While it is true that the trial judge did not seek the advice of counsel at the time he discharged the juror in question, the record reflects that the trial judge did receive and consider one of the alternatives now suggested in connection with the discharge of one of the jurors excused earlier in the day. The prosecutor, in order to avoid losing a juror who claimed he was needed at home to care for his incapacitated parents, suggested to the court that rather than discharging the juror, he be sent home with a court officer or sheriff to make sure he remained sequestered.

The court rejected that alternative: "I am going to excuse him because I want him to concentrate on this case. I do not want to separate the jury. The risks are too great in a situation like that."

The judge's remarks indicate to me that his principal concern in discharging that juror (and inferentially the twelfth juror, since the reasons for their discharge were similar) was to insure that the jury which tried the defendant was uninfluenced by outside sources of concern or information. What Mr. Chief Justice Jones stated in *Com. v. Stewart, supra* is equally applicable here:

> "The trial court was insuring that appellant would receive a trial by a fair and impartial jury which would return a verdict based solely on evidence adduced at trial. This is an interest which is to be protected not only for defendants, but also for the public, which has a compelling interest in justice for all. See *Gori v. U. S.*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); *Thompson v. U. S.*, 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894); *Simmons v. U. S.*, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891)." 456 Pa. at 453, 317 A.2d at 619 (footnote omitted).

The fact that alternatives to discharge were available does not mean that the trial judge abused his discretion in discharging the juror and aborting the trial. *Com. v. Monte*, 459 Pa. 495, 329 A.2d 836, 840–41 (1974). The crucial question, to my mind, is whether the trial judge reasonably concluded that the juror could no longer continue as a juror because of her emotional state. He alone was best suited to make that determination and I find nothing in the record to indicate he was in error. See *Gori v. U. S., supra*; see also *U. S. v. Holland*, 378 F.Supp. 144 (E.D.Pa.1974), affirmed, sub nom. *U. S. v. Murphy*, 506 F.2d 1053 (3d Cir. 1974), *cert. denied, Ehly v. United States*, 420 U.S. 994, 95 S.Ct. 1433, 43 L.Ed.2d 676 (1974); Annot., 53 A.L.R. 1062.

I would reverse the order granting appellee habeas corpus relief and remand the case for a new trial.

NIX, J., joins in this dissenting opinion.

WEST KEY NUMBER SYSTEM

Anthony D. PIRILLO, Jr., Esquire, et al., Petitioners,

v.

Honorable Harry A. TAKIFF.

Anthony D. PIRILLO, Jr., Esquire, et al., Petitioners,

v.

Honorable Harry A. TAKIFF and Walter M. Phillips, Jr., Esquire.

Supreme Court of Pennsylvania.
July 7, 1975.

Certiorari Denied and Appeal Dismissed
Jan. 26, 1976.
See 96 S.Ct. 873.

Nos. 184, 214, Misc. docket No. 20, petition for assumption of plenary jurisdiction, writ of prohibition and supersedeas.

Anthony D. Pirillo, Jr., Salvatore J. Cucinotta, Philadelphia, for petitioners.

Michael L. Levy, Philadelphia, for respondent Walter M. Phillips, Jr.

Jonathan Vipond, III, Philadelphia, for respondent, Hon. Harry A. Takiff.

Before JONES, C. J., and EAGEN, O'BRIEN, ROBERTS, POMEROY, NIX and MANDERINO, JJ.

ORDER

PER CURIAM.

And now, this 7th day of January, 1976, the above captioned matters having been

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA EX REL. GEORGE WALTON	:	DECEMBER TERM, 1974
	:	NO. 6
vs.		
	:	HABEAS CORPUS
LOUIS AYTCH, Superintendent Philadelphia County Prisons	:	(COMM. V. GEORGE WALTON APRIL 1974 NO. 134-138)

OPINION OF THE COURT

SAVITT, J. April 23, 1975

The case of Commonwealth v. George Walton, relator, was called to trial on Wednesday, November 27, 1974, before the Honorable Stanley Kubacki and a jury. Judge Kubacki in his preliminary remarks to the full jury panel stated that those chosen as jurors would not be sequestered but could return home each evening, except during actual deliberations. Subsequently, a jury of fourteen including two alternates was selected, none of whom had raised any objection to the possibility of being sequestered during deliberations. The jury was excused for the Thanksgiving weekend without being sworn.

When trial resumed on Tuesday, December 3, 1974, defence counsel disclosed to the court that a news article concerning George Walton and a co-defendant had appeared in the Philadelphia

Daily News.[1] After prompt inquiry, it was learned that none of the jurors had read the article. The jury was then sworn and the Commonwealth proceeded to present its case.

Subsequently Judge Kubacki discovered a second news article which had later appeared in the same newspaper entitled "Brown Silenced by Walton--D.A." As a result of this article Judge Kubacki, on his own motion, sequestered the jury because of possible prejudice to the defendant.

During the course of the day two jurors asked to be excused because of the sequestration order. These jurors, Juror No. 1 and Juror No. 7, were excused and replaced by the two alternates. Both counsel objected to the court's order excusing Juror No. 7. At the end of the court's day, the jury now consisting of twelve members was sequestered at the Holiday Inn.

At approximately 11:00 P.M. that evening Judge Kubacki received a phone call from a court officer attending the jury and was advised that Juror No. 10, Irene Kamen, had not been

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1 Trial did not resume on Monday, December 2, 1974, as scheduled since on that date, the Commonwealth moved for a continuance before the Homicide Assignment Judge in another courtroom. The Commonwealth request for a continuance was denied.

successful in making arrangements for a baby sitter for her children, ages 10 and 6. This was followed by several phone calls by Judge Kubacki and various court officers in an unsuccessful attempt to locate a baby sitter. At approximately 11:45 P.M. Judge Kubacki, after talking to Mrs. Kamen and finding her "very, very distressed", excused her from the jury, ex parte. The next morning upon being advised of the previous evening's occurrences, relator found it unacceptable to proceed with eleven jurors. Judge Kubacki then formally declared a mistrial.

Before this court is a Petition for a Writ of Habeas Corpus averring that a retrial would place relator in double jeopardy. The sole question to be decided by this court is whether relator having been placed in jeopardy once can now be retried.

FEDERAL LAW

A defendant is placed in jeopardy in a criminal proceeding once he is put to trial before the trier of facts, whether the trier be a jury or a judge. Green v. U.S., 355 U.S. 184 (1957). However, the Commonwealth is not automatically prohibited from retrying a defendant because he has been tried before, even where the jury is discharged without the consent of the defendant. Such a mechanical rule would be inappropriate even for the

added assurance of personal security and freedom from governmental harassment. "A defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, 336 U.S. 684 at 688-689 (1949).

Over 150 years ago, the Supreme Court, through Mr. Justice Story, formulated the standard to be determined in cases such as these where a mistrial has been declared without the consent of the defendant.

> "We think, that in all cases of this nature the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases, especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." U.S. v. Perez, 22 U.S. 579 (1824).

The Perez Doctrine of "manifest necessity" remained the standard of appellate review for testing the trial judge's exercise of his discretion in declaring a mistrial until 1961. See Simmons v. U.S., 142 U.S. 148 (1891); Thompson v. U.S., 155 U.S. 271 (1894); Wade v. Hunter, supra. While adhering to the basic principle of the Perez Doctrine, the Supreme Court in Gori v. United States, 367 U.S. 364 (1961) added another factor to be determined by the trial judge in declaring a mistrial. In Gori, the trial judge declared a mistrial because the prosecution's questioning of a witness might have lead to the introduction of evidence of prior crimes. The Supreme Court held that where a trial judge was acting "in the sole interest of the defendant" a sua sponte mistrial was proper. Gori v. U.S., supra at 369.

In 1971, the Supreme Court in U.S. v. Jorn, 400 U.S. 470 (1971) abandoned the Gori principle.

> "Further, we think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action." U.S. v. Jorn, supra, at 483.

. . . .

> "In sum, counsel for both sides perform in an imperfect world; in this area, bright-line rules based on either the source of the problem or the intended beneficiary of the ruling would only disserve the vital competing interests of the Government and the defendant." U.S. v. Jorn, supra, at 486.

The standard of "manifest necessity" first adopted in Perez was then reiterated.

> "In the absence of such a motion (by the defendant for a mistrial), the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." U.S. v. Jorn, supra, at 485.

The Court held that in the final analysis, the judge must always temper the decision whether or not to abort trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. U.S. v. Jorn, supra, at 486.

In the Supreme Court's latest decision concerning this particular aspect of double jeopardy, Illinois v. Somerville, 410 U.S. 458 (1973), the court held that a trial judge properly

exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. U.S. v. Somerville, supra, at 464.

Exactly what constitutes "manifest necessity" and "ends of public justice" remains vague and unclear. Decisions escape meaningful categorizations and each case must necessarily turn on its own particular facts. U.S. ex rel. Russo v. Superior Court of N. J., etc., 483 F. 2d 7 (3rd Cir. 1973). See also U.S. v. Somerville, supra, at 431.[2] However, certain factors should always be taken into consideration. When there is a

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[2] Cases finding "manifest necessity" and "ends of public justice" include U.S. v. Ball, 163 U.S. 662 (1896)(conviction reversed on appeal); U.S. v. Perez, supra (jury could not reach verdict) but see U.S. ex rel. Russo v. Superior Ct. of N.J., supra, (jury dismissed prematurely); Smith v. State of Miss., 478 F. 2d 88 (5th Cir. 1973)(suspected jury bias) and U.S. v. Holland, 478 F. Supp. 144 (E.D. Pa. 1974) (juror physically and emotionally unable to continue in jury deliberations). Cases not finding "manifest necessity" and "ends of public justice" include U.S. v. Jorn, supra, (witnesses not warned of the 5th Amendment right); Downum v. U.S., supra, (prosecution's key witness missing); U.S. v. Walden, supra, (possibility of two jurors seeing defendant handcuffed); U.S. v. Tinney, supra, (defendant 10 minutes late for final arguments). U.S. v. Kin Ping Cheung, 485 F. 2d 689 (5th Cir. 1973)(Interpretor not understanding Chinese dialect of witness).

doubt whether double jeopardy has attached, that doubt should be resolved in favor of the liberty of the individual in order to prevent the exercise of "an unlimited, uncertain and arbitrary judicial discretion." U.S. v. Downum, 372 U.S. 734 (1963) at 738. U.S. v. Tinney, 473 F. 2d 1085 (2nd Cir. 1973). Before the trial judge declares a mistrial, it is incumbent upon him to exhaust all other reasonable possibilities before deciding to foreclose defendant's option to proceed. The trial judge must make a scrupulous exercise of judicial discretion, he must seek out and consider all possible alternatives before declaring a mistrial. U.S. v. Walden, 448 F. 2d 925 (4th Cir. 1971); U.S. v. Tinney, supra; U.S. v. Spinella, 16 Cr. L. 2375 (5th Cir. Jan. 13, 1975). See also U.S. v. Walden; Double Jeopardy and the Mistrial, 34 U. Pitt. L. Rev. 714.

PENNSYLVANIA LAW

The prohibition against double jeopardy contained in the 5th Amendment was made applicable to the states by its incorporation in the 14th Amendment in 1969. Benton v. Maryland, 395 U.S. 784 (1969).

Prior to Benton, Pennsylvania interpreted its own double jeopardy clause (Pa. Constit.-Article I §10) to be applicable only to capital cases. Comm. v. Simpson, 310 Pa. 380 (1933). With the adoption, however, of the federal standard, the double jeopardy clause became applicable to all criminal actions and the Perez Doctrine as stated by the United States Supreme Court in U.S. v. Jorn, supra, was adopted.

The first case to come before the Supreme Court of Pennsylvania after Benton involved a request of a mistrial by a District Attorney. Believing that his closing argument was not forceful enough, he requested a mistrial on the grounds that defendant might be acquitted. The judge granted his motion. Finding no "manifest necessity" the court reasoned that to allow retrial because the prosecutor believed his presentation of evidence to be poor, would make a mockery of the double jeopardy clause. Comm. v. Richbourg, 441 Pa. 147 (1971).

Since adopting the Federal standard, the Pennsylvania courts, like the Federal courts, have proceeded on a case by case analysis. In Comm. v. Ferguson, 446 Pa. 24 (1971), a key witness for the Commonwealth became ill. In holding that double jeopardy attached, the Court warned the lower courts that before a mistrial is declared, the alternatives must be checked out and considered. Reminding the courts that any doubt must be resolved in the favor of the liberty of the individual, the court held that unless there is a definitive diagnosis that no other reasonable alternative exists to the granting of the mistrial, the courts may not subject the defendant to a second trial.

In Comm. v. Shaffer, 447 Pa. 91 (1972) a statement by the District Attorney indicating a prior criminal record was held not to be "manifest necessity" where the defendant wished to continue with the trial. The court held that a sua sponte mistrial can only be declared in very extraordinary and striking circumstances, and the discretion of the judge to declare a mistrial must be scrupulously exercised. This was again reiterated in Comm. v. Wideman, 453 Pa. 119 (1973) (trial judge's convenience does not represent "manifest necessity").

On August 1, 1968, Pennsylvania Rules of Criminal Procedure §1118(b) became effective holding that:

> "A motion to declare a mistrial shall be made when the prejudicial event is disclosed. In all cases only the defendant or the attorney for the defendant may move for a mistrial."

Following the adoption of Pa. R. Crim. Pr. 1118(b) the Pennsylvania Supreme Court held that the language of the rule was clear and its intendement was to remove from the trial judge the power to declare mistrials sua sponte. Comm. v. Lauria, 450 Pa. 72 (1972). The Court, however, later qualified this ruling, holding that Pa. R. Crim. P. 1118(b) applied only to a situation where a mistrial is declared due to a prejudicial event occurring at trial. Comm. v. Brown, 451 Pa. 395 (1973). Later the court again qualified its ruling in Lauria holding that under appropriate circumstances and in the interests of justice a judge may declare a mistrial in spite of Pa. R. Crim. P. 1118(b). This right to declare a mistrial is inherent and while there is no mechanical or per se rule, a judge may abort a trial "if the trial judge takes all the circumstances into consideration and in its sound discretion finds that there is a manifest necessity for the act or the ends of justice would be otherwise defeated." U.S. v. Perez, supra, Comm. v. Stewart, 456 Pa. 447 (1974). The Court held that insuring the defendant would receive a fair and impartial trial based solely on evidence is in the interests of justice. The court felt the ends of justice would be defeated

if the defendant was not permitted to be retried. Comm. v. Stewart, supra, (deceased's father was tipstaff to jury).

Effective September 1, 1974, the Pennsylvania Rules of Criminal Procedure §1118(b) was amended to read:

> "When an event prejudicial to the defendant occurs during trial, only the defendant may move for a mistrial; the motion shall be made when the event is disclosed. Otherwise, the trial judge may declare a mistrial only for reasons of manifest necessity."

WALTON

After reviewing the federal and state law on double jeopardy, it now becomes necessary to review the particular case before us to determine if the relator may be retried.

The Commonwealth does not argue that jeopardy did not attach. The relator in his first trial was definitely placed in jeopardy. Green v. U.S., supra.

The Commonwealth does, however, contend that relator's refusal to proceed with eleven jurors was tantamount to consenting to a mistrial. Even if this were so, the actions of the previous evening, in the absence of relator or his counsel, vitiated that consent. Where there is no choice but to consent to a mistrial, the consent will not constitute a waiver of double jeopardy. See U.S. v. Dinitz, 492 F. 2d 53 (5th Cir. 1974) (removal of defense counsel precipitated motion for mistrial).

The question before this Court, therefore, is whether the trial judge, without the consent of relator, dismissed the jury through "manifest necessity" or "in the interests of justice".[3]

Prior to determining "manifest necessity", it is important to establish the time of the mistrial. If the mistrial occurred, as the Commonwealth argues, the morning of December 4, 1974, when the relator refused to proceed with eleven jurors, then "manifest necessity" definitely existed and the mistrial was proper. Comm. v. Reeves, 218 Pa. Super. 88 (1970). If, however, the mistrial occurred the evening of December 3, 1974, there is a serious question as to the propriety of the mistrial.

Although the mistrial was not formally declared until the next morning, it is necessary for a reviewing court to carefully scrutinize the record and determine if the mistrial had, in reality, occurred earlier. U.S. v. Tinney, supra. In studying the facts before us, this court reaches the conclusion that the

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3 Relator argues that "in the interests of justice" does not apply in Pennsylvania because Pa. Rules Crim. Proc. 1111(b) only allows "manifest necessity" as a reason for a trial judge to declare a sua sponte mistrial. This court, in reading the comments to Rule 1111(b) believes it was amended to conform to the Perez Doctrine. The Perez Doctrine allows for not only "manifest necessity" but also if "the ends of public justice would be defeated". The Penna. Supreme Court in Comm. v. Stewart, supra, used the terms "in the interests of justice" and "the ends of public justice would be defeated" interchangeably.

mistrial occurred the evening of December 3, 1974. At that time relator's options were seriously limited. When he appeared in court the next morning, relator had already been deprived of the twelve man jury he had chosen to determine his fate. To proceed would have necessitated relinquishing one-twelfth of the jury he had determined to be favorably disposed toward him. To not proceed would have necessitated a request for a mistrial. Thus, either option would obtain the same result, the loss of the tribunal relator chose to determine his fate. When the juror was removed ex parte, it is clear to this court that a mistrial had occurred. It thus becomes necessary to determine whether the trial judge acted with "manifest necessity" or "in the interests of justice" when he released the twelfth juror.

As previously mentioned, whether a trial judge acts with "manifest necessity" must be determined on a case by case analysis. A review of previous cases, both state and federal, indicate that we are involved in a most unique fact situation. There is no doubt that a serious problem demanding prompt attention arose late the night of December 3, 1974. Judge Kubacki acted promptly, rationally and with due care and regard for a mother who grew fearful of her children being left alone. The question before this court, however, is whether Judge Kubacki acted with "manifest necessity" or "in the interests

of justice" toward the relator. This court can find neither "manifest necessity" nor that the mistrial was declared "in the interests of justice". Judge Kubacki in his anxiety to aid a juror with a serious personal problem failed to seek out and consider all avenues of cure to avoid trial abortion. U.S. v. Walden, supra; Comm. v. Ferguson, supra. See also United States v. Holland, 378 F. Supp. 144 (E.D. Pa. 1974) where Judge Becker, before dismissing the jury because a woman juror was physically and emotionally ill, summoned to her aid two doctors who testified as to her condition; deferred jury deliberations for one day in order for her to rest; interviewed her in chambers and did not declare a mistrial until he felt the return of the juror to the deliberation room would have been "little short of barbaric".

In the present case while Judge Kubacki did make an attempt to reach neighbors by phone, there were other reasonable alternatives to be used before aborting trial. The court could have dispatched a court officer to watch the children or a policeman or matron might have been sent to the juror's home. If the mother's presence was absolutely necessary at home, a court officer could have accompanied her to the house to maintain the sequestration order. The court could have exercised its power under Pennsylvania Rules of Criminal

Procedure §1111(c) and lifted the sequestration order in the interests of justice.

At the very least, the trial court should have contacted defense counsel and the District Attorney to determine their views on the situation. A phone call to both counsel may have resulted in an alternative to aborting the trial. Defense counsel would have had the opportunity to inform the judge of defendant's preferences and desires. An accused or his counsel must be present at every critical stage of criminal prosecution where the substantial rights of an accused may be affected. Comm. ex rel. Rambeau v. Rundle, 455 Pa. 8 (1973). Certainly the decision to abort a trial is a critical stage of the criminal prosecution.

This court recognizes that we are in possession of one of man's greatest tools: 20/20 hindsight. Judge Kubacki did not have this formidable tool at his disposal and his actions on that evening were done in a manner he felt was necessary at a very pressing and difficult time. Judge Kubacki acted in a manner of great concern for a juror who was "very distressed". We do not feel, however, that the best interests of the defendant were served by the mistrial and mindful of the United States

Supreme Court admonition that "any doubt should be resolved in favor of the liberty of the individual", Downum v. U.S., supra, we conclude that the trial court failed to adequately protect Walton's right to have his case decided by a particular tribunal.

The Commonwealth's reliance on Commonwealth v. Stewart, supra, is erroneous. In Stewart, the court found it was "in the interests of justice" to declare a mistrial when the trial judge learned that the deceased's father was a tipstaff to the jury.

The court placed heavy reliance on the fact that the mistrial was for the benefit of the defendant. While this alone is not sufficient to warrant a sua sponte mistrial, see U.S. v. Jorn, supra, it is of vital importance in evaluating whether the mistrial was "in the interest of justice". In the case at bar, if anything was a benefit to the relator, it was the sequestration order, not the declaration of the mistrial. The dismissing of a juror to attend to her children benefits only the juror.

Additionally, in Stewart, there was a possibility that the jury had been biased by the presence of a person within their midst who was directly involved with the case. Where there is the possibility of jury bias, a judge does not have

to delve into the suspected bias. The possible bias in itself affords ground for a sua sponte mistrial. Smith v. State of Miss., 478 F. 2d 88 (5th Cir. 1973). In the present case no possibility of bias existed.

For the reasons stated above this court grants relator's Petition for a Writ of Habeas Corpus.

Sarett

J.

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION

COMMONWEALTH	:	April Sessions, 1974
	:	Nos. 134 MURDER
vs.		135 VOL. MANSLAUGHTER
	:	136 INVOL. MANSLAUGHTER
		137
GEORGE J. WALTON	:	138 CRIMINAL CONSPIRACY

Room 232, City Hall

Philadelphia, Pennsylvania

November 27, 1974

BEFORE: HON. STANLEY L. KUBACKI, J.

and a Jury

APPEARANCES:

DENNIS COGAN, ESQUIRE
Assistant District Attorney
For the Commonwealth

STANLEY BASHMAN, ESQUIRE
For the Defendant

ALSO PRESENT: ALBERT DEUTSCH, ESQUIRE

FIRST DAY

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courtroom knows where you live. You will not be sequestered. That means that you will be able to return to your homes at night. However, on the last day when you are deliberating, should your deliberations extend beyond the normal working day, then and under those circumstances I will see that you are sent to a hotel where you will be very comfortable and well fed. It will mean that you may have to be away for one evening. Now, the chances of that occurring are rather remote but I do want to point it out to you because it may be that there is someone here who has problems so critical that they could not remain away from home even for one evening.

Is there such a person here?

THE CRIER: Your Honor, No. 1228, Anne McGinnis.

THE COURT: Is it Mrs. McGinnis?

MRS. McGINNIS: Yes.

THE COURT: What would be the problem, Mrs. McGinnis?

MRS. McGINNIS: I have a mentally retarded child.

THE COURT: Good afternoon, ladies and gentlemen. This is a homicide case. We need a few more jurors. Should you be selected, you will be excused until Monday when this trial will start and you will, of course, be paid for being absent on Friday. I have a list of your names here and the occupation you had at the time you filled out your questionnaire. I do not have your addresses and no one in this room has your address.

You will not be sequestered. By that I mean you will be able to return to your homes at night. However, on the last day there is always a chance that should your deliberations be extensive and it goes beyond a normal working day, I would see that you are quartered well in a hotel in town and that you are fed well. Occasionally there is someone who cannot stay away from home even for one night although you will be prepared for it.

Is there such a person here who has personal problems that would make it impossible?

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION

COMMONWEALTH : APRIL SESSIONS, 1974

:

vs. :

: NOS. 134-138

GEORGE WALTON

ROOM 613, City Hall

Philadelphia, Pennsylvania

December 2, 1974

BEFORE:

HON. DAVID N. SAVITT, J.

PRESENT:

RICHARD SPRAGUE, ESQUIRE
Assistant District Attorney
For the Commonwealth

STANLEY BASHMAN, Esq.
Attorney for the Defendant

MR. HAINES: The Commonwealth is prepared to proceed this morning with a petition that we filed in the Court on Friday afternoon in the matter of Commonwealth v. George Walton.

THE COURT: Is the original petition in the Quarter Sessions file?

(Whereupon petition handed to the Court.)

THE COURT: I have the petition, the return date was allowed by the Court on Friday for today.

MR. HAINES: Mr. Bashman is here and Mr. Sprague is here in the District Attorney's office and will handle this matter on his behalf.

THE COURT: Thank you. Is the defendant here?

MR. BASHMAN: The defendant is not here.

THE COURT: I would like the defendant brought down.

THE SHERIFF: Yes, sir.

THE COURT: Mr. Bashman, have you prepared an answer?

MR. BASHMAN: I have that.

THE COURT: Has the District Attorney been supplied a copy?

MR. BASHMAN: Yes.

THE COURT: I am just going to recess until the

defendant is brought down. As soon as he is brought down, we will begin.

(Recess taken.)

(Whereupon defendant brought into the courtroom).

THE COURT: I am ready to proceed, Commonwealth v. George Walton, I have a petition to extend the commencement of trial under Rule 1100 (c) filed by the District Attorney's office.

I have an answer to that petition filed on behalf of the defendant by Mr. Bashman.

MR. BASHMAN: May that answer be made a part of the record?

THE COURT: Both the petition and the answer will be made a part of the record.

MR. SPRAGUE: May I make a preliminary statement, your Honor?

THE COURT: Of course.

MR. SPRAGUE: We will follow it up with testimony but, the purpose of this hearing, your Honor, as I understand it, is to request this Court to grant the Petition by the Commonwealth to extend the present time for which the Commonwealth to try the defendant here, George Walton.

It is my understanding that the 270 day limitation

of time will expire today. The possibility, if you count the time out, it would have ended yesterday, on Sunday, although I think under the rules of construction if it ends on a Sunday, it goes on to the last day, at least Monday, but in any event from a prior conversation that I had with Mr. Bashman, it is agreed that the extension would be from Sunday to today, Monday, without raising of the question of it having been on Sunday, is that correct?

MR. BASHMAN: That is a correct statement of a conversation Mr. Sprague and I had on Friday afternoon.

MR. SPRAGUE: And it is so agreed?

MR. BASHMAN: Yes.

MR. SPRAGUE: To set this in perspective, your Honor, at this moment there is, as I understand it, a jury which has been selected before Judge Kubacki to try this defendant, George Walton, on four charges of murder.

That jury has, as of this moment, not been sworn for a number of reasons, and, as I understand it, Judge Kubacki is holding up at this point the swearing of that jury and the commencement of testimony probably to await the ruling by this Court.

Now, the reason that we are here this late date on this petition, your Honor, arises from the fact that there is another defendant named Brown, and it is the Commonwealth's position that under the peculiar facts that exist in this situation, the fact that Mr. Brown has indicated he is not going to plead guilty and is not going to be a witness for the Commonwealth against Walton, which was a promise which had been conveyed to the Commonwealth, and as I understand it, even a request to that effect in the presence of your Honor at a meeting with the counsel for Brown, because of that the Commonwealth wants to go ahead with the trial of Brown which is listed for tomorrow in front of Judge Stout, and what we are asking is that the trial of Walton be delayed merely until the end of the Walton trial.

Now, I am not saying it necessarily--

THE COURT: You mean until the end of the Brown trial.

MR. SPRAGUE: Until the end of the Brown trial. I am not saying that it necessarily involves removing of the jury that has been selected to try Walton since that jury has not been sequestered and has not been sworn perhaps they can remain in effect in Limbo. That is a matter that can be taken up between all

counsel and Judge Kubacki. I don't think that's the problem that is here.

The problem is strictly whether or not in view of the way in which the Commonwealth had been led to believe that we would have the testimony of Brown, and make no mistake about it, Brown's testimony is important against Walton; in view of the fact that apparently this defendant here, Walton, was able to get in touch with Brown prior to Brown being taken into Court, and this defendant himself indicated even to a Sheriff's officer that after his contact with Brown, Brown would not testify against him; that these facts were just uncovered this past week; that the Commonwealth has acted with due diligence and it would be in the interest of justice which I think is a concern of this Court to grant our application.

I think I should have made that preliminary statement. I am ready to call Mr. McLaughlin.

THE COURT: Before you proceed can I ask you this, Mr. Sprague, if Brown is tried and the Walton case is not presently tried, what assurance is there then that Brown will be a witness for the Commonwealth or is that merely conjecture?

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MR. SPRAGUE: That is merely conjecture, there is no assurance. I did hope that if, in fact, Brown sees that he is not going to be able to have his cake and eat it both, that, in fact, he is going on trial and Walton's trial is being delayed, that Brown will then see the error of his ways and testify. I have no such assurance. It is just a hope.

It exists in part because of conversations that we have had with Brown's counsel, who I do not believe is personally against the Commonwealth's thoughts in this case. So, we have hope.

In any event, we have a possibility of being in a better position than we certainly are if we are forced to proceed at this point against Walton.

THE COURT: Mr. Sprague, assuming everything that you have said in your preliminary statement is true, without the need to present any evidence to substantiate it and without going into the question of due diligence, which is the underlying phrase in Rule 1400(c) that is pertinent, the question first would have to be decided whether this Court feels that what you have stated is adequate grounds to continue the Walton case.

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MR. SPRAGUE: That is correct.

THE COURT: Considering, of course, that Mr. Walton, as he sits now, is innocent until proven guilty, as all defendants are; that the case has already been called to trial on Wednesday; that the public, as well as the defendant are entitled to defendants being tried speedily; that the fact that the Commonwealth is asking for a continuance in the hope that they may convict a co-defendant and therefore hopefully will obtain testimony from him, this Court would be disinclined to grant a continuance for those reasons. And, therefore, I really don't see the necessity of going into anything further because if that is the basis for your continuance, I would deny it.

MR. SPRAGUE: What I have stated is the basis, without the number of specifics about the agreement arrived at by the Commonwealth with Brown's counsel--

THE COURT: Assuming that to be true--

MR. SPRAGUE: I just want to make sure that the record has it.

THE COURT: If the defense counsel had a witness that he thought would testify favorably to his client and then at the last moment the witness

became recalcitrant and he had hopes that as a result of some subsequent proceeding, the witness then might testify favorably, I wouldn't grant a continuance for that reason--

MR. SPRAGUE: Your Honor--

THE COURT: Let me just finish for a moment. When a defendant is arrested and he is charged and has a preliminary hearing and he is indicted, the Commonwealth presumably has a case and witnesses available to proceed. This is now nine months after that fact. The defendant is presumed innocent. He is on trial and the Commonwealth is saying, "If you continue it and delay it further, we may, because of the use of the criminal process against a co-defendant, have him testify when he now says he wouldn't", and I just don't feel that is an adequate reason to continue a case.

MR. SPRAGUE: May I also say, your Honor, that it is the same prosecutor who, of course, is trying Walton and trying Brown; that I daresay when we talk about due diligence in the interest of public in view of the present law, which in first degree murder cases requires the Commonwealth to

try each defendant separately, I think that the Appellate Courts would, of course, recognize the fact that you would properly try one case, then the next case, then the next case, in some situations.

THE COURT: This Court, as the Assignment Judge, has within the framework of reason always permitted the Commonwealth to do that and had Brown, if the Commonwealth had asked Brown to be listed for trial a month ago or two months ago or three months ago, quite likely that circumstance would have occurred.

MR. SPRAGUE: May I interrupt the Court to say that, and I think the record would show, that after the Commonwealth had an agreement with Brown's counsel, there were attempts by the Commonwealth to get Brown's case listed. A number of problems arose in determination of that listing. Some arising because of competency problems by Brown. So, I do not think that there was lack of diligence by the Commonwealth there.

THE COURT: I am not even, frankly concerning myself with the question of diligence. I know the Assistant District Attorney who worked in this

room, Mr. Haines, has always acted diligently. There has been a tremendous effort on behalf of the District Attorney and this Court to try this case. That is why we are really here, because the Walton case is listed for trial just a few days before the 270th day. Whether the Commonwealth is presenting now sufficient ground upon which to base a continuance is my problem now and I don't think they are.

I know that the Commonwealth was led to believe about two or three weeks ago at least, that Walton would plead guilty, and I know there were certain circumstances which made it impossible to bring him to trial at that point, but I feel that the conjecture, the hope that if Brown is convicted that he will then testify isn't sufficient reason to deny a defendant's right to be tried under these circumstances.

MR. SPRAGUE: What about the offer of evidence of the defendant Walton contacting Brown this past week to get him not to testify and announcing that?

THE COURT: Well, that surely could constitute an independent crime, Mr. Sprague, if, in fact,

that is so but does it really relate to the question as to whether Brown will testify or doesn't that make it less likely that Brown will testify? Let me ask you this, if Brown is convicted of murder in the first degree, he would then, in all likelihood, appeal his case. What could the Commonwealth offer to induce him to testify at that time if he is reluctant to testify now?

MR. SPRAGUE: Very easy, and that is exactly one of the points. Brown is being charged with four murders. There is a whale of a difference between concurrent life sentences and consecutive life sentences, which has in many instances quite an effect on defendants deciding how to cooperate. You know we are dealing with a case where it is the Commonwealth's contention that we have people who were hired for an assassination.

I think that the Rule, Rule 1100, which is promulgated by the Supreme Court, was a Rule in the overall admission of justice with the recognition by that Court of it not becoming ironclad. Hence, the exception and providing for the Commonwealth

at anytime prior to trial coming in with an application to extend that time. I think that our application here has been brought--

THE COURT: No question.

MR. SPRAGUE: as promptly as possible once we became aware of these other factors and I don't think your Honor questions that. You just said, "yes, you have done everything and you have done it promptly, but I don't think these facts warrant what you want."

THE COURT: That is correct. It seems to me that weighing all of the equities the interest of justice entitles a defendant to a speedy trial and gives the public the right to have defendants brought to trial speedily. I do not think that the Commonwealth can take a case which is already on trial and ask for a continuance to use the Court system to hopefully convict another defendant and hopefully have him change his testimony.

MR. SPRAGUE: Let us assume that we had a case that involved, let us say, five co-defendants in a descending chain or ascending chain of murder.

Would it be this Court's view that the Court is powerless to recognize at times in some particular cases the importance of going from one case to the next, and this time limitation must apply to all?

THE COURT: First of all, that question is not before this Court at this time, however, I can say this, that this Court will always cooperate with the District Attorney in an effort to list cases promptly where the District Attorney wants them properly disposed of, as the Court would cooperate with a defense counsel who is seeking to have a case disposed of.

MR. SPRAGUE: My question addresses myself to whether or not the Court feels it does have the power in terms of recognizing that there are times that you must proceed from one case to the next and for that reason, and that alone, to extend the time?

THE COURT: The Court would act to continue a case based on the individual circumstances of the case and the Court would deal with the question of extending 1100 (c) as to whether the Commonwealth could not proceed despite due diligence

under the circumstances of that case.

In the instant case, it is this Court's feeling that there is not sufficient ground to continue the case of Walton at this point.

MR. SPRAGUE: Would your Honor, in view of your decision--

THE COURT: I have not decided yet, Mr. Sprague. I just told you my feeling. I do not want you to feel that you are precluded from presenting any testimony but there is no point, I thought, in proceeding as long as you know how I am thinking.

MR. SPRAGUE: That is why I made the statement because I kind of felt from prior conversations that is where we are going to end up, and I thought of avoiding going through testimony and cross-examination, so much the better in terms of time. If it is agreed by counsel, and knowing Mr. Bashman, usually when he is ahead of the game, he does not intend to say anything, if it is agreed that, in view of the statement and the Court's feeling about it, there is no need to go ahead with testimony that is fine with me.

THE COURT: Do you have anything to say?

MR. BASHMAN: I see no need for testimony.

MR. SPRAGUE: The testimony is here to pick up the general statements and with more specifics along that same line, which does not change the overall statement that he made.

THE COURT: Well then, I am prepared to rule and on the basis of what I have heard, the Commonwealth's petition to extend commencement of trial under Rule 1100(c) is denied for the specific reason that the Court feels that under the circumstances of this case, a continuance is not warranted.

MR. SPRAGUE: Now, your Honor, would you, and I am asking this Court to sign a certification to the Supreme Court of Pennsylvania if possible, asks you now to certify to the Supreme Court for immediate review, the denial of the Commonwealth's petition for an order under Rule1100 (c) to extend the time for commencement of trial. We put on a basis of the certification, the decision involves the controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this decision is necessary as the Commonwealth is now

substantially impaired in its prosecution of this case.

THE COURT: Mr. Bashman?

MR. BASHMAN: Will your Honor indulge me for a moment?

MR. SPRAGUE: Does your Honor want to see the document?

THE COURT: Yes, please.

(Whereupon above noted document handed to and examined by the Court.)

MR. BASHMAN: Mr. Sprague, might I ask you the question, how long do you contemplate this order to come before the Supreme Court? They are currently meeting here now.

MR. SPRAGUE: I intend to go there right now. I don't know whether they will accept it or not, even if the Judge would assent to it. On the other hand, I do not know whether they would assent to it or not even if the Judge does not assent to it.

MR. BASHMAN: Its probably interlocutory.

THE COURT: I just want to know your position with respect to whether the Court should sign the certification.

MR. BASHMAN: I would oppose it, your Honor.

THE COURT: The Court feels that what is before the Court is an application to continue. This Court deals on a daily basis with applications to continue. When this Court orders a case to trial on the basis of its discretion that a case should be tried, whether the application be made by the defense or the prosecution, if each one of these questions could be taken before the Supreme Court, it would totally impede the progress of the list.

This is interlocutory. This is within the discretion of the Court and the Court feels it is a clear circumstance where the case should move forward and be tried, and I will not sign it and I will not grant a stay.

MR. SPRAGUE: I have one response to that, however, that when your Honor says it is interlocutory, unless the Commonwealth has opportunity to test that ruling now, Commonwealth never does get an opportunity to. So, I disagree with that use of the Code.

THE COURT: Mr. Sprague, you are respectfully entitled to disagree. I appreciate it and I feel it is simply the denying of a Motion to Continue

a case and I do not think that is a proper appealable issue. To set such a precedent would render it impossible to operate this room.

MR. SPRAGUE: Very well, your Honor.

THE COURT: As I understand it, Judge Kubacki is ready to proceed as soon as the defendant is available and it is 11:15. I think all parties should be present in Judge Kubacki's room at 11:45 to proceed with the trial and it is so ordered. The Court will take a brief recess.

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IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION

COMMONWEALTH	:	APRIL SESSIONS, 1974
	:	NOS. 134 MURDER
v.		135 VOL. MANSLAUGHTER
		136 INVOL. MANSLAUGH
	:	137
		138 CRIMINAL CONSPIRACY
GEORGE J. WALTON	:	

Room 232, City Hall

Philadelphia, Pennsylvania

December 2, 1974

BEFORE: HONORABLE STANLEY L. KUBACKI, J.

and a Jury

APPEARANCES:

DENNIS COGAN, ESQUIRE
Assistant District Attorney
For the Commonwealth

STANLEY RASHMAN, ESQUIRE
For the Defendant

ALSO PRESENT:

ALBERT DEUTSCH, ESQUIRE

SECOND DAY

(Thereupon, the following occurred in the ante room, outside the presence of the jury panel:)

MR. COGAN: Let me state for the record in the matter of the Commonwealth v. George Walton, the Commonwealth today submitted a petition before the Honorable Judge David Savitt, who is Calendar Judge in the Homicide Program here in Philadelphia. The petition was to extend the commencement of trial under Rule 1100-C. As this Court is already aware, the 270th day in the George Walton matter ran yesterday, December 1, 1974. It is our request before the Court under Rule 1100-C to grant an extension because of the extenuating circumstances. The Commonwealth, in its opinion, exercised due diligence in bringing this case to trial relying on the assurances of the co-defendant, Leroy Brown, and his attorney that Leroy Brown was going to be a Commonwealth witness and be in the position to testify against George Walton.

The judge in the Calendar Room, Judge Savitt, denied the petition--

MR. BASHMAN: My silence is not to be construed as consent in any way to any of the evidentiary remarks that Mr. Cogan makes.

THE COURT: Of course.

MR. COGAN: The judge denied our petition and also refused a request to sign a certification to the Supreme Court of Pennsylvania. We are now going to seek a supersedeas in the Supreme Court of Pennsylvania and ask that the Supreme Court of Pennsylvania grant a stay of these proceedings. It is now 11:50. That should take approximately an hour or so to get that before the Supreme Court. I am asking the Court to convene this trial at 2 o'clock.

MR. BASHMAN: I have no objection to that, Your Honor.

THE COURT: All right. Excuse the jury until 2 o'clock.

(Luncheon recess.)

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(AFTERNOON SESSION.)

(Whereupon, the following occurred in the anteroom, outside of the presence of the jury panel:)

MR. COGAN: Judge, on the George Walton matter, we saw you shortly before 12 o'clock today. It is now 2 o'clock and the Court indicated that we would begin testimony this afternoon at 2 o'clock. Paper work has been prepared and we are taking an Interlocutor; Appeal to the Supreme Court of Pennsylvania. In order to effect that appeal, we need a supersedeas from the Justice of the Supreme Court. The justices are in session and cannot see Mr. Sprague and me until this afternoon after the session. The paper work has been prepared and will be duly filed and a copy will be given to counsel.

For that reason I am asking that we continue this matter over until tomorrow morning. Of course if there is not a stay order by then, of course we will begin trial with what we have.

MR. BASHMAN: I must respectfully object to that. I would ask Your Honor to make a statement to this jury that any delays in this case are not of any doing of the defendant's or his counsel.

MR. COGAN: Fine. As long as you add it is not the Commonwealth's either.

THE COURT: Mr. Bashman, in the administration of justice of this case, I don't want to get this thing started and then have to put them on a shelf or whatever I have to do with them tomorrow and they still have not been sworn. I am excusing this jury until 9:30 tomorrow morning.

MR. BASHMAN: Note my objection to that.

THE COURT: If you are turned down, we go with whatever you have. If we are forced to go to trial tomorrow, would your client want a jury?

MR.COGAN: We still have evidence that would get beyond the demur, Judge, so we contend.

MR. BASHMAN: Fair enough. I will go

with a jury.

THE COURT: Because I should not like to go ahead with a jury and then have to sustain a demur. It makes no sense.

MR.COGAN: That will be up to you when that motion is made.

THE COURT: Very well, gentlemen.

(Whereupon, the proceedings were adjourned until December 3, 1974, in Room 232, City Hall.)

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IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION

COMMONWEALTH	:	APRIL SESSIONS, 1974
	:	NOS. 134 MURDER
v.		135 VOL. MANSLAUGHTER
	:	136 INVOL. MANSLAUGHTER
		137
GEORGE J. WALTON	:	138 CRIMINAL CONSPIRACY

Room 232, City Hall

Philadelphia, Pennsylvania

December 3, 1974

BEFORE: HON. STANLEY L. KUBACKI, J.

and a Jury

APPEARANCES:

DENNIS COGAN, ESQUIRE
Assistant District Attorney
For the Commonwealth

STANLEY RADINAN, ESQUIRE
For the Defendant

ALSO PRESENT:

ALBERT [illegible], ESQUIRE

THIRD DAY

(Whereupon, the following occurred in the anteroom, outside the presence of the jury:)

MR. BASHMAN: I just want to say that I think Your Honor should make some comment to the jury about yesterday's delay. Also--and it is in my bag--I would like to offer a copy of a Daily News article that appeared in the Four Star Daily News yesterday. I do not know if there was a follow-up article in the Night, and I don't know if there is an article in today's paper at all having to do with the Leroy Brown situation as it was developing yesterday. I think I ought to get it and let Your Honor read it for comment.

THE COURT: I have it.

MR. BASHMAN: I would like to make a motion for the discharge of the jury--I withdraw that.

I would like to make a motion that Your Honor ought to make some sort of a cautionary comment as far as that article goes.

In addition to that, I imagine it is

appropriate now to make a motion that all Commonwealth witnesses be sequestered.

THE COURT: By sequestered you mean out of the courtroom?

MR. BASHMAN: Out of the courtroom.

MR. COHAN: With respect to the newspaper article, I would suggest that the Court ask the jury if they heard anything more about this case since the jury was selected. If the response to that was negative, I think it would be in the best interests of everything not to say anything.

MR. BASHMAN: Perhaps that is a good idea.

MR. COHAN: As far as the sequestration is concerned, I would have no objection to that whatsoever. I would ask the Court to make an exception concerning Detective Andrews, who is the assigned detective. This is a cumbersome matter with a lot of witnesses and a lot of evidence. He is familiar with it and he could be of great assistance to me. I ask that the Court make an exception

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to the assigned detective, which is frequently done in these matters.

MR. BARSHAY: I have no objection.

MR. COHAN: I intend to use in my opening, for illustrative purposes, only the diagram of the area around 5180 Viola Street. I thought I would call it to the attention of the Court, so if there is any objection to it, it is not in the middle of my opening.

MR. BARSHAY: Are you going to use it in the trial?

MR.COHAN: Yes.

THE COURT: To show what you intend to prove?

MR.COHAN: Yes.

(Whereupon, the following occurred in the courtroom, in the presence of the jury panel:)

THE COURT: Ladies and gentlemen, I do regret the fact that you waited yesterday, but there were many matters that had to be taken care of and disposed of concerning this case. I shall also like to ask this question

of the panel: Have any of you since you were selected, heard anything about this case or read anything about this case at all?

(No response.)

THE COURT: We will proceed. Swear the jury in.

(Whereupon, the jury panel was duly sworn.)

THE CRIER: Please remain standing. I will read to you the initial Bills of Indictment handed down by the Philadelphia Grand Jury concerning the defendant George Walton. On this Bill of Indictment Number 134, April Sessions, 1974, charging George Walton with Murder, that he, George Walton, on or about February 18, 1974, in the Philadelphia County, did willfully, maliciously, and with malice aforethought kill one Cathy Parrera, all of which is against the peace and dignity of the Commonwealth of Pennsylvania. To this bill of indictment the defendant has pleaded not guilty.

On this Bill of Indictment Number 135,

THE COURT: We are going to take a ten-minute recess at this point.

(Recess held.)

(Whereupon, the following occurred in the anteroom, out of the presence of the jury panel:)

THE COURT: Look at what was in the Daily News today.

MR. BASHMAN: I believe we have put into the record what was in yesterday's Daily News earlier today. If not, I would like that article put into the record. And this article, which is undated, which is today's Daily News, which says: "Brown silenced by Walters: D.A." is today's Daily News.

MR. COGAN: As far as this case is concerned today, as far as the witnesses are concerned, I do not know how long the next three witnesses who I have lined up will take on direct and cross-examination. Beyond the next three witnesses, I have scheduled the Medical Examiner for tomorrow, the members of the family for tomorrow and Detective Ross, who, incidentally, as of

the beginning of this week left the Homicide Division and took a job outside the Police Department. He just started the job this week. So he was not scheduled until tomorrow. We might have some difficulty going beyond these three witnesses today. I call that to Your Honor's attention now.

THE COURT: Gentlemen, I made up my mind I am going to sequester this jury.

MR. BASHMAN: I think Your Honor ought to explain to them that it is no doing of either the Commonwealth or the defense. I think it is a mandatory situation.

THE COURT: Where are they going to go?

THE COURT OFFICER: The Holiday Inn, 18th and Market.

MR. COGAN: I think you are in the situation that if there is a request for a sequestered jury--is there a request?

THE COURT: I am going to do it.

MR. COGAN: I think we ought to find out from the jury what kind of person crisis

might be involved, if any.

(Whereupon, the following occurred in the courtroom, in the presence of the jury panel:)

THECOURT: Ladies and gentlemen, have any of you purchased a copy of the Philadelphia Daily News today?

(No response.)

THE COURT: I am going to sequester you, ladies and gentlemen. When we recess for lunch, your luncheon order will be taken. Today it will be sort of a box lunch. During this period of time they will arrange with you the bringing of your toothbrushes here and a change of clothing and things like that. You will be put up close by in a very nice motel. You will be fed from now on.

Your problem concerning how long this will last--we will be driving to finish this before the week is out so that you might rejoin your families.

I understand there is one person here who has an obligation to see a doctor tomorro

We will make arrangements for that through the doctor here or the Medical Examiner here. Your own personal needs will be taken care of. They will call your families, so you need not have fears upon that score.

Is there anyone here to whom this would mean a tremendous hardship?

JUROR #1: My husband and my daughter are both home sick.

THE COURT: You could not stay until Friday?

JUROR #1: No, I could not.

THE COURT: Gentlemen.

MR. COGAN: May we discuss it at side bar?

THE COURT: Surely, let us discuss it at side bar.

(Whereupon, the following occurred in the anteroom, out of the presence of the jury panel:)

THE COURT: Any problems, gentlemen, with excusing this juror right now?

MR. COGAN: I am really concerned

about whether there is a necessity to sequeste this jury at this point. They have insisted--they have all claimed that they have not read the Daily News. If you admonish them as you have, there is no harm done yet. The only possible harm that could exist is if they violate other orders, that is, if they discuss it with other people.

THE COURT: If there is a conviction, I know that this is what Mr. Bashman will harp on.

MR. BASHMAN: His Honor made this motion, not me.

THE COURT: Yes, I decided this.

MR. BASHMAN: It is clearly a very prejudicial article to Walton.

THE COURT: We will excuse Juror No. 1 and put No. 13 in that spot.

MR. COGAN: If that is the decision.

THE COURT: I think that is the wisest decision.

MR. COGAN: Do you have an objection to that?

MR. BASHMAN: No, I guess not. Your Honor, I would say this: I think that the question about the Daily News and then the sudden sequestration of the jury, I think there has to be more of a statement than that.

THE COURT: They will not speak to their families on the phone. When they are sequestered, they are really sequestered.

MR. BASHMAN: I know. And their newspapers are cut out. They are going to start to speculate in their own minds what is in that Daily News article.

THE COURT: What are you asking for?

MR. BASHMAN: I think a more definite statement spelling out the situation that they are not to draw any inferences from any questions you have asked them or from the fact that they are being sequestered now, as to the guilt or innocence of this man. I think that is a substantial factor now. This is not done by any motion of either the Commonwealth or the defense, but out of necessity.

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THE COURT: I will tell them that the decision is my decision.

MR. BASHMAN: Will you go so far as to say the rest of what I asked?

THE COURT: I really do not see why it is necessary. But if you insist, I shall.

MR. BASHMAN: I think it may be important.

(Whereupon, the following occurred in the courtroom, in the presence of the jury panel:)

THE COURT: Incidentally, ladies and gentlemen, this is my decision to sequester you. This was discussed, of course, back in the anteroom. I also want to tell you that you are not to speculate on this turn of events or hold it against the Commonwealth or the defendant, the very fact that you are being sequestered.

Mrs. Anderson, I am excusing you. You will return to the Jury Assembly Room. You will get instructions. Mrs. Jones, you will sit in the spot to be vacated by Mrs. Anderson. You may do this now, please.

(Whereupon, Juror Number 1[illegible] replaced Juror Number 1 in the jury box.)

THE COURT: Continue, please.

MR. COGAN: James McCauley.

MR. BASHMAN: I ask for an offer of proof at side bar, Your Honor.

THE COURT: Very well.

(Whereupon, the following occurred at side bar, out of the presence of the jury panel:)

MR. COGAN: Mr. McCauley will testify consistently with what I mentioned in my opening address, that he was a block and a half away, that the two black men asked for directions to the Department of Public Welfare Office. He will describe them in a matter which others will take up from there. There will be an identification made and this is necessary to establish the chain.

MR. BASHMAN: How about a time?

MR. COGAN: He will establish the time.

all cases.

THE COURT: Let us go, gentlemen.

MR. BARMAN: If Your Honor pleases, I am not unaware of the strategic points in breaking a case. If it has to be that way, I would rather break now and have the cross follow direct rather than have them go to lunch with direct in their ears.

THE COURT: Very well. We will recess until 2:10.

(Luncheon recess.)

(AFTERNOON SESSION.)

(Whereupon, the following occurred in the anteroom, out of the presence of the jury panel:)

THE COURT: Gentlemen, we have some problems with some jurors but one is a rather critical problem, that is Juror No. 7.

MRS. WOLF: Number 7, Mr. Van Horn.

THE COURT: Mr. Van Horn. He has two parents, both of them are quite ill. He has been cooking for them and taking care of them and so on. Mrs. Wolf did talk to his mother,

who has become almost hysterical. I believe that was your description of what you told me.

MRS. WOLF: Yes.

THE COURT: She has become hysterical about his being sequestered and not being able to return home. He has also spoken to Mrs. Wolf. He is aware of the problem. He is very, very concerned about the problem. We have other problems like doctor's appointments and things like that, which we will work on and resolve. One of them is diabetic and needs special food. We will do our best for her.

This means excusing Juror No. 7 and replacing him with the alternate juror. Gentlemen, if we run into trouble with another juror, where do we go from there? Will you agree that we may proceed with eleven jurors?

MR. COHAN: It is not for me to say. It is for the defendant to say.

MR. BARMAN: I think maybe we ought

to face that if we have to.

MR. COGAN: I have no objection to replacing this particular juror. But this is the kind of thing I guess you can expect in a situation where we told them at the beginning, when the jury was selected, they would not be sequestered. And in the middle they were sequestered. That is why I suggest to the Court that unless you feel that it is of the utmost necessity that they be sequestered and the usual cautionary instructions not be good enough in this case, that we not do it.

THE COURT: Mr. Cogan, I think in this case, in view of what has happened--

MR. BAERMAN: Aren't we past that? I thought you had ruled on that.

MR. COGAN: There is always the possibility of a new ruling.

THE COURT: I am always willing to change my mind. I have changed my opinions many times in my life.

MR. COGAN: The newspaper article that was referred to this morning, I looked for it this afternoon after we recessed for lunch.

I found it on Page 20 or 21 of the Daily News. It is not really even a very large article.

MR. DEUTSCH: The headline itself can destroy you.

THE COURT: Are there any circumstances--I understand a reporter was just back here in the courtroom, was he not?

MR. BAERMAN: He is outside.

MR. DEUTSCH: "Brown Silenced by Walton."

THE COURT: Gentlemen, this is what we have: If it should occur where we get less than 12 jurors, you do not want to commit yourself now?

MR. BAERMAN: I do not see how I can without conferring with my client.

THE COURT: Because we will have a mistrial then.

MR. COGAN: Let me say this, I feel this is a right issue now because we are now without alternates. Since this is a decision that counsel for the defense must make along

with his client and I have nothing to say about it, they should not be in a position to make that choice when they see who that particular juror is. The rule provides that it be done in advance.

MR. BARBMAN: The rules provide when there is twelve in the box, the lawyer has to make the decision then.

MR. COGAN: That is right, because to do otherwise would make it possible for counsel to decide to move for a mistrial if they were not satisfied with the particular juror that was there. If it is in issue, and the defendant insists that he be tried by twelve, I want that on the record now and the Court knows he has to grant a mistrial if another juror has to leave.

MR. BARBMAN: I think that is a most unfair situation.

THE COURT: Why?

MR. BARBMAN: Suppose two die overnight and it is not eleven, it is ten? It may never come about. Now I know nothing in

the law -- and if Your Honor wants to give us time -- these are very unique points to me. I have never been bothered by this one before. We would like some time to research the point. If we are going to play this thing, we are going to play it. Mr. Cogan talks with authority, knocks the table. I don't know the answer because I have not been that fortunate. I have never been involved in a situation where two alternates disappeared, I have not been involved in that situation before. I refuse to be forced into that position where I make that decision, not knowing what the law is. This is a problem and if Mr. Cogan is right, I will make the decision. But there is a possibility that Mr. Cogan is wrong.

MR. COGAN: Do you have a copy of the Rules of Criminal Procedure, Judge?

MR. DEUTSCH: That is not the problem. We do not make an objection before the occasion arises just to make an objection or a motion.

MR.COGAN: If I might just raise another matter that comes to my attention. As I understand it--and I do not mean to be obstreperous in any way--Mr. Deutsch, who is an old time acquaintance of mine does not have any standing in this case, he does not represent the defendant. The defendant specifically said on the record, at the beginning of this trial--

MR. BASHMAN: He is here to advise me, Mr. Cogan.

MR. COGAN: He may advise you but he has no standing to speak to the Court in this matter.

MR. BASHMAN: I think Judge Kubacki will decide that.

MR. COGAN: I make an objection for the record.

THE COURT: What we will do, gentlemen--I do not know the answer to this, either, whether or not you must make a decision. But I can see the merit in Mr. Cogan's statement.

MR. BASHMAN: Do you want to give us

an hour, we will come back and discuss it?

THE COURT: No. Certainly we will have the answer by tomorrow morning.

MR. BASHMAN: That is fair enough.

THE COURT: I will work on this tonight.

MR. COGAN: Let me ask this, then: Can we resolve it today before you excuse the juror that you were about to excuse, so that we know exactly where we stand on this thing?

THE COURT: I am going to excuse this juror right away.

MR. COGAN: You mean his emergency arises at this moment?

THE COURT: No. There is no point in him having to sit here for the rest of the afternoon. I might as well return him to the pool and let him go to work elsewhere.

MR. COGAN: You said your rulings are subject to change. If you find we are faced with a situation of a possible mistrial or a revocation of your initial order to sequester, perhaps your decision will be different. I am asking merely that you not

excuse him, since the alternate is going to be here and hear the testimony anyway, until we resolve the issue or until the end of the day.

THE COURT: Can we have somebody in your office check this out and I will try and get my law clerk?

MR. [redacted]: Can I have a moment to talk to Mr. Bashman?

MR. BASHMAN: It has not been said that you cannot talk out loud.

MR. [redacted]: No, I just want to discuss this.

(Pause.)

THE COURT: Before the day is out, we will try to get answers to this. I will hold this juror in the box until the close of the day.

MR. BASHMAN: If Your Honor please, this is such a critical issue, the Lord knows we have never delayed this case. The Commonwealth delayed the case a day--

THE COURT: We are not talking about that.

THE COURT: I will deny your motion to strike.

(Whereupon, the following occurred in the courtroom, in the presence of the jury panel:)

THE COURT: Let us give the jury a short break.

(Recess held.)

(Whereupon, the following occurred in the anteroom, outside the presence of the jury panel:)

MR. COHAN: Rule 1103 provides that any time prior to verdict it can be less than twelve with the agreement of counsel for defendant, and more than six. In other words, you cannot go under six.

THE COURT: That does not answer the question.

Both counsel must agree on this, however. The question is may I force Mr. Bashman to make this decision now?

MR. BASHMAN: That is the question.

MR. COHAN: I do not believe so.

THE COURT: I do not believe so, either.

MR. COGAN: Here is the rule, Judge.

THE COURT: I am ruling on the point raised before by the District Attorney and Mr. Bashman. Now we will proceed with the twelve jurors. Should that occasion arise, a decision will have to be made on whether we will proceed with eleven jurors. The decision will have to be made at that time. I cannot force Mr. Bashman to do it now.

MR. BASHMAN: Just for the record, I understand the problems but I am going to object to the allowance of the juror to be excused. You will have to overrule my objection if you wish.

MR. COGAN: I object, too.

I would ask if the man must go home tonight or if there is a family emergency of some kind, that a Court Officer or Sheriff be dispatched to accompany him to make sure that he is sequestered. There is no reason to lose this juror under these circumstances.

THE COURT: You mean sequestered at his home?

MR. COGAN: That is correct, that he does not discuss this case with anybody.

MR. DEUTSCH: You will have to destroy all the newspapers in the City.

MR. COGAN: Just make sure the Sheriffs do it.

THE COURT: I have made my decision. I am going to excuse him because I want him to concentrate on this case. I do not want to separate the jury. The risks are too great in a situation like that.

MR. BASHMAN: Are we through with this point?

THE COURT: Yes, we are.

MR. BASHMAN: I raised the issue on the possibility of a record concerning this last witness. I was assured by Mr. Cogan that Detective Andrews checked it and that there is no record. Is that correct, Mr. Cogan?

MR. COGAN: That's correct.

THE COURT: Do you want to recess for the balance of the day?

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MR. COGAN: It is really up to the Court.

THE COURT: I want to know about your witness problem. I would like to get as much work as we possibly can.

MR. COGAN: The only witnesses I have are members of the decedents families. I can maybe call two of them today and get that out of the way.

THE COURT: Let us do that. Let us try to get in as much as we possibly can. The rest of them you will have tomorrow morning plus the Medical Examiner?

MR. COGAN: Yes.

THE COURT: I do not want to send them over to the hotel now, not after 3:00.

(Whereupon, the following occurred inthe courtroom, in the presence of the jury panel:)

MR. COGAN: I call Jane Walters, please.

THE CRIER: Raise your right hand on the Bible. Would you state your name and address and spell your last name for the record please.

A. Haverford.

Q. Did she leave home at ten after 12:00?

A. She left my house at exactly ten past 12:00.

MR. BARBAN: I have no further questions.

THE COURT: How old was Cathy?

THE WITNESS: 20, sir.

MR. COGAN: You may step down. Thank you. The other decedent's family member is not here today. She is scheduled to be here tomorrow. So if we may break now, I know Your Honor was going to break anyway at this time.

THE COURT: Members of the jury, I think it is Mr. Van Horn who has some domestic crisis; is that correct?

JUROR No. 7: Both my parents are incapacitated.

THE COURT: Your presence is desperately needed at home; is that correct?

JUROR No. 7: I have been taking care of them.

THE COURT: They have called and

spoken to your mother and I think the Court Officer, Mrs. Wolf has also spoken to you about this problem, has she not?

JUROR NO. 7: I mentioned the situation to her.

THE COURT: Mr. Van Horn, I will excuse you then so that you may return to take care of your family, your mother and your father. You will be replaced by Mrs. Timinsky, who will take the seat that you now occupy.

Juror No. 7, thank you very much.

(Whereupon, Juror No. 14, replaced Juror No 7 in the jury box.)

THE COURT: I know this is a little bit of a surprise to you, ladies and gentlemen of the jury. I know there are a couple of people that have medical appointments. We will do everything we possibly can and make all calls and we will take care of all your needs.

I understand there was one gentleman here who has a problem, who needs a special diet. This will be worked on, also. We will

do our very best to see that you get the proper foods. You will be in very good hands. The only thing you will not be able to do is read the newspapers and watch the news programs. Other than that, you will be well taken care of. We will recess until 9:30 tomorrow morning.

(Whereupon, the Court recessed until December 4, 1974 in Courtroom 232, City Hall.)

IN THE COURT OF COMMON PLEAS

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

TRIAL DIVISION

COMMONWEALTH : April Sessions, 1974

: Nos. 134 MURDER
135 VOL. MANSLAUGHTER
136 INVOL. MANSLAUGHT
137
138 CRIMINAL CONSPIRA

vs.

GEORGE J. WELSH

Room 532, City Hall

Philadelphia, Pennsylvania

December 4, 1974

BEFORE: HON. STANLEY L. KUBACKI, J.

and a Jury

APPEARANCES:

DENNIS COGAN, ESQUIRE
Assistant District Attorney
FOR THE COMMONWEALTH

STANLEY RADCLIFF, ESQUIRE
FOR THE DEFENDANT

ALSO PRESENT: ALBERT DEUTSCH, ESQUIRE

FIFTH DAY

85a

(Whereupon, the following occurred in the anteroom, out of the presence of the jury:)

THE COURT: Gentlemen, last night, beginning at about eleven o'clock, I was on the phone. My first telephone call was from Court Officer Helen Wolf who told me she had been receiving calls from the Court Officers and attendants to the jury and principally Mr. Zaccaria here, Mr. Leonard Zaccaria, about a Juror, Irene Kaman, who is Juror No. 10. You will recall that she is the woman who is married to a policeman and who is separated from that policeman and who has two small children. I spoke to Mrs. Wolf about what instructions she had received from Mrs. Kaman about preparing for her sequestration. She has a male friend and she was to call this male friend and give the names of two women who are to take care of these two children. They were of very tender age. One is in

kindergarten. Apparently everything had become aborted and there were problems and these children were alone and this male friend called about what could be worked out.

I called and got through to Mr. Zaccaria and I spoke to him last night. Then, absent you gentlemen, I spoke to Irene Hamm about these problems. She was very, very distressed about this, with the knowledge that these children were unattended that night. After I spoke to her, I asked to speak to Mr. Zaccaria again and I said he should have her call those neighbors who were the women involved, whose names had been given to Mrs. Wolf, to see if anything can be resolved. I asked him to put her back on the phone. I asked her if those women could be reached. I stood by the phone and it was then Mr. Zaccaria called me back and he explained that she had been unsuccessful. I spoke to her again

and I spoke to Mr. Zaccaria again. At a quarter to 12:00 last night, I said very well, under the circumstances, these youngsters are alone and unattended and she is to be returned to her home. She has been returned to her home. We now have eleven jurors.

Mr. Hamm, the ball is in your court. We talked about this yesterday and now we have this problem.

MR. GREAN: I see no reason why we cannot continue with the case.

MR. HAMM: Would Your Honor give me some time to talk to the defendant?

THE COURT: Please talk to the defendant. As you understand, I have to make a decision directly.

(Recess.)

(Whereupon, the following occurred in the anteroom, out of the hearing of the jury:)

THE COURT: Mr. Hamm.

MR. HAMM: Your Honor, I have

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done some very, very extensive research. We have done some thinking, we have done some talking. I have talked to the defendant. It is our position that Your Honor--most respectfully--by Your Honor's act in discharging this juror on your own motion, without conferring with counsel for the defense or counsel for the Commonwealth, has in effect caused a mistrial. We do not move for a mistrial. It is our opinion that a mistrial has already happened by Your Honor's motion. We do not agree to go to trial with eleven jurors. We do not--and we emphasize that--we do not move for a mistrial. We must respectfully object to Your Honor's unilateral action, without at least consulting with counsel. We feel by so doing, Your Honor has committed a mistrial, something that our actions cannot cure.

THE COURT: Very well. I

previously stated that last night, when these series of telephone calls began to my home, I faced a crisis situation. There were two young children of very tender years who were unattended for the night and one of them was a kindergarten pupil.

At that time I did make this decision and I am positive, under the circumstances, it was the wisest decision to have been made. I did excuse this juror. I am now, therefore, asking you, Mr. Eschman, do you wish to continue with eleven jurors?

MR. ESCHMAN: It is our contention that we do not have to face that decision, Your Honor because Your Honor has already caused a mistrial by discharging that juror. I will say it again, I have discussed it with Mr. Walton. Mr. Walton will not waive the eleven jurors. We do not tend such a waiver but we do not move for a mistrial. It is our contention

that Your Honor has already done that.

THE COURT: Obviously you are trying to establish at the next trial you will raise the problem of double jeopardy.

MR. [redacted]: I think that is obvious.

THE COURT: Do you wish to say something?

MR. COHAN: Yes. Number one, as far as the prospect of whose motion this is going to be as to what is going to happen to this jury, the ball is clearly is defense counsel's court as to whether or not they wish to continue with eleven jurors. As I understand, they are refusing to go without the full compliment of twelve jurors. Rule 1107 of the Rules of Criminal Procedure states clearly that only with the consent of defense counsel and the Court can we continue with less than twelve jurors in a case at any time prior to verdict.

I I will also make this suggestion to the Court because the Commonwealth is able and willing and anxious to proceed with the trial. I will ask that the Court enter into a colloquy with the defendant on the record regarding whether or not he wishes to continue the trial with eleven jurors.

Number two, assuming that he does not agree to that on the record, I would ask the Court to make inquiries of the whereabouts of Juror 10, the one who was excused in the middle of the night without consultation with counsel for the defendant and counsel for the Commonwealth, to find out whether or not she could be brought to this Court, to find out through an extensive colloquy whether she has had any discussions with anybody about this case and if in fact she has not, I would ask that she remain on the jury. She has not been officially discharged for the record. We have not begun

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the proceedings for the day. I would ask that she remain as a juror in this case and I would ask the Court to lift the general sequestration order in effect on the jury.

MR. BAUMAN: If Your Honor pleases, I would say that that juror has been discharged by you last night, whatever time that was. I don't remember what time Your Honor said. That juror is no longer a member of this jury. She is not under oath any longer. Your Honor relieved her of that burden.

THE COURT: I sent her home last night.

MR. BAUMAN: You discharged her from the jury.

MR. OGBAN: Did you communicate with her, Judge?

THE COURT: I spoke to her last night.

MR. OGBAN: Did you tell her she was discharged?

THE COURT: I did not tell her. I told Mr. Zaccaria that she was to be taken home, to make sure that she got home so that she might take care of these children.

MR. OGBAN: I would suggest in the alternative--

THE COURT: I did not specifically discharge her. I will tell you now, under the circumstances this was my thought last night.

MR. BAUMAN: That is fair enough.

MR. OGBAN: But I think we might find that there is no harm done if she has not discussed this case with anybody.

MR. BAUMAN: You cannot separate a jury and bring them back as you wish or choose--

MR. OGBAN: Excuse me, I was in the middle of a sentence--in the middle of a word, in fact. The question

is whether or not a sequestration order should be in effect and whether or not there was a breach of sequestration. That falls squarely within the discretion of the trial Judge. That goes for jurors as well as witnesses. Frequently there is a call by one side or the other that a witness being called for one side has breached the order of the Court. That does not mean he cannot testify. That is likewise at the discretion of the Court.

And with a juror it would be squarely up to Your Honor if she did not discuss it with anybody, if she is able to sit on this jury during the day. If Your Honor feels that since there is no continuing publicity on this case, that you may want to lift the order of sequestration, it is entirely at your discretion. The Appellate Courts would not overturn that decision because it is a case of your discretion.

THE COURT: Gentlemen, I am

going to speak with Judge Sevitt, the Calendar Judge about this.

MR. BARSHAY: Could we, in order to do this in some kind of a sensible fashion--I have no objection to you discussing it with anybody, of course. Can we adjourn this matter until two o'clock in order--

THE COURT: I want it squared away now. I want to work on it now. Can we check to find out if Irene Kaman reported to the jury assembly room?

MRS. WOLF: Yes, sir.

(Pause.)

MRS. WOLF: She has not reported today, Your Honor.

(Whereupon, the following occurred in the Courtroom, out of the presence of the jury panel:)

THE COURT: Gentlemen, last night, about midnight last night I had spoken to Mr. Mesevris and this juror, Irene Kaman, was excused last night. She

is not present here in the Courtroom today.

Mr. Walton, would you stand up, please. Mr. Walton, I am sure that your attorney has explained to you that we now have eleven jurors. I am asking you now, do you wish to proceed with eleven jurors?

MR. BARNHAM: Your Honor, I am going to object on the record to a colloquy between yourself and Mr. Walton in the middle of the trial.

THE COURT: Your objection is noted. Mr. Walton, do you wish to proceed with eleven jurors?

THE DEFENDANT: Well, I am on trial but I would rather my attorney speak for me. I think he already knows what I want to do.

THE COURT: Can you tell the Court what you want to do? Do you wish to continue with eleven jurors or not?

You may consult with your attorney.

(Pause.)

THE DEFENDANT: No, sir.

THE COURT: Very well. It is the position--

MR. COGAN: May I make a statement for the record in open Court, inthe presence of the defendant?

THE COURT: Of course.

MR. COGAN: It is the Commonwealth's position that the Court should summon Juror No. 10, Mrs. Kannan, I believe, to this Courtroom and to enter into a series of questions and answers with her, number one, to firmly establish for the record exactly the crisis situation that she faced last night.

Number two, to determine through a series of questions whether or not there has really been in effect a breech of sequestration, whether or not she has in fact discussed this matter with anybody and whether in fact she is in the frame of mind such that she can continue as a

juror in this case.

It will be the Court's decision to make as to whether or not there is in fact a breech of the sequestration order. You may determine, after questioning her, that she can remain as a juror in this case, and you may further determine -- and I would ask the Court to do this on my motion--to lift the sequestration order for the entire jury now that it is clear that there is not a day to day coverage in the press on this case. If it is necessary in fact for you to avoid any problems in the future, to even impress a gag order on the press regarding this particular case. But I don't think we are faced with the problem that it cannot be corrected if it is dealt with properly.

THE COURT: I have no doubt that there was a crisis last night and it was faced. There were extensive and repeated telephone calls made. The Court did speak to Irene Kamen herself and he

was aware of her distress when he spoke to her last night. I think there is no question that the circumstances were extreme last night when the Court made that decision and excused Mrs. Kamen.

The entire jury panel now knows that an article did appear in the Philadelphia Daily News and if we broke sequestration, I am wondering whether or not their curiosity would be so overwhelming that they might seek out that article.

Let me hear from you, Mr. Bashoon. Do you want to respond?

MR. BASHOON: Yes, Your Honor. I would say that since this juror has left the sequestration of the jury, once this juror has returned home, she has not reported for jury duty today, I understand--I don't know if that was part of your statement earlier or not--she is a tainted juror. To bring her back here and to interrogate her might be

highly prejudicial to both sides. I would say to Your Honor that if she were brought back here, I would ask for the right to question her closely and I would be fearful that by doing so I might incur her ire, her anger. I think it is impossible to have her brought back into the jury box.

THE COURT: Gentlemen, we have here a mistrial. I have spoken to the Calendar Judge. You gentlemen are to return to the Calendar Judge for a re-assignment on this matter.

Call in the jury, please, I would like to explain what has transpired. There is no need for this defendant to remain, is there?

MR. BARRETT: If Your Honor pleases, Your Honor may know this and I may not. I don't know if Your Honor knows whether we are going to get an immediate assignment out again or not.

THE COURT: I do not know.

MR. BARRETT: If that is a possibility, I think under those circumstances I would object to Your Honor talking to the panel. The jury, upon discharge, will return and become jurors again. They then may taint every other juror sitting up there waiting for an assignment.

THE COURT: Don't you think citizens are owed an explanation of why they were locked up last night?

MR. BARRETT: Your Honor, as against the freedom of George Walton, the answer has to be no.

THE COURT: Nevertheless, the Court is going to give the jury an explanation.

MR. BARRETT: Your Honor will note my objection to that for the record.

THE COURT: Of course.

(Whereupon, the jury panel was brought into the Courtroom and the following occurred:)

THE COURT: Good morning, members of the jury. I hope you have rested well. We have a very, very serious problem. I do not think anybody has had a similar experience. As you know, we did lose two jurors and you know now that Juror No. 10, Irene Kamma, is not with us. She was excused by me shortly before midnight last night because of a very pressing domestic crisis.

In any event, we now only have eleven jurors. Because of this fact, we cannot proceed with eleven jurors. So we have now a mistrial in this case. I want to thank you. I hope you have not been too inconvenienced and I hope that last night's experience was a good one for you. You are excused. Please send them back to the jury assembly room.

(Whereupon the jury left the Courtroom and the following occurred:)

THE COURT: Gentlemen, you are to return to the calendar room for

re-assignment.

(Whereupon, the proceedings were concluded.)

PHILADELPHIA DAILY NEWS
DECEMBER 2, 1974

Key Witness in 4 Killings Decides Against Testifying

A key witness against George Walton, charged with killing four persons in a West Philadelphia home, has decided not to accept a negotiated guilty plea and testify against Walton.

Codefendant Leroy Brown, 23, of Hazel st. near 57th, had been expected to plead guilty to second-degree murder involving one of the four shootings at 4180 Violet st. last March 7.

But after Walton's case began Brown changed his mind.

Walton, 30, of Folsom st. near 38th, pleaded innocent last week to four counts of murder. A jury has been selected and testimony was to begin today.

ASSISTANT DISTRICT ATTORNEY Dennis Cogan asked Friday that Walton's case be postponed. Walton's lawyer, Stanley Bashman, says it's now too late for the D.A.'s move.

The D.A.'s office now wants to try Brown before Walton. Bashman points out that Walton must be tried because the required 230 days to try him has expired.

Walton is charged with the murders of Ruby Holland, 24, of the Violet st. address; Cathy Ferrara, 20, of 578 Barrett ave., Haverford; Ronald Handy, 26, of 2704 Sheridan, Bartram Village; and Charles Walker, 34, of Aspen st. near 38th.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

75-
No. 1764

Supreme Court, U. S.
FILED
JUL 9 1976
MICHAEL RODAK, JR., CLERK

LOUIS AYTCH, Supt.
Phila. County Prisons,
Petitioner

v.

GEORGE WALTON,
Respondent

PETITIONER'S REPLY MEMORANDUM

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 1764

LOUIS AYTCH, Supt.
Phila. County Prisons,
Petitioner

v.

GEORGE WALTON,
Respondent

PETITIONER'S REPLY MEMORANDUM

In his brief opposing certiorari, respondent asserts that:

> [T]his Court, most respectfully, is bound by the finding of the lower court, absent clear evidence to the contrary, that the twelfth juror was permanently discharged on the evening of December 3, 1974; that circumstances precluded her from being brought back under the conditions of sequestration that existed at the time . . .

Respondent's brief at 10.
Neither the habeas corpus court nor the Supreme Court of Pennsylvania made any finding even similar to the assertion that

"circumstances precluded her from being brought back under the conditions of sequestration that existed at the time..." However, those courts did conclude (after reviewing the cold record equally available to this Court[1]) that the mistrial occurred when the juror was sent home. The habeas corpus court never addressed itself to the issue whether the juror sent home could have been returned to service. That court simply reasoned:

> In studying the facts before us, this court reaches the conclusion that the mistrial occurred the evening of December 3, 1974. At that time relator's options were seriously limited. When he appeared in court the next morning, relator had already been deprived of the twelve man jury he had chosen to determine his fate . . . When the juror was removed ex parte, it is clear to this court that a mistrial had occurred.

(21a-22a)

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1 As was pointed out in Superintendent Aytch's Petition, the trial judge did not entertain respondent's petition for writ of habeas corpus. Instead, the matter was assigned to another judge of the Philadelphia Court of Common Pleas.

The Pennsylvania Supreme Court, on the other hand, reasoned:

> First, the trial judge must have viewed his action of allowing the juror to return home as a discharge of the juror because had he viewed his action as merely excusing the one juror from sequestration, he could have returned the juror over the objection of defense counsel. Thus, since the juror was discharged when she was allowed to return home, the possibility of returning her did not exist.

(4a). (footnote omitted).

However these conclusions by the state courts may properly be designated, it is at once clear that they are not the sort of findings of historical fact which are binding here unless they be unsupported. Rather they are, at most, inferences which this Court must reject if they are not properly inductable from the uncontested historical facts. Cf. Culombe v. Connecticut, 367 U.S. 603-606 (1961). Nonetheless, when tested by either standard, the "finding" urged here by respondent cannot be sustained. The trial court stated on the morning of December 4, that he had sent the juror home the night before but that she had not been "specifically discharged." (93a). He heard lengthy argument from both counsel on the advisability of returning her to jury service if she had not been exposed to any outside influence. (91a-100a). There was also extensive discussion of the option of proceeding with eleven jurors. Finally, as was pointed out in the dissenting opinion of Mr. Justice Pomeroy, the other jurors were not

dismissed until December 4. (6a at n.*) The only conclusion which can be drawn from these historical facts is the mistrial was declared when it was declared, on December 4. (100a). The only straw of support for the conclusion that the mistrial occurred the previous night lies in defense counsel's insistence to that effect in his argument to the trial judge. (88a). To insist that the world is flat will not make it so.

Respectfully submitted,

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